Supreme Court, U.S.
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961366 FEB 25 1997

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

In re

JUDY MADSEN JOHNSON, ED MARTIN, SHIRLEY HOBBS and RESCUE AMERICA,

Petitioners.

On Petition for Writ of Mandamus to the Eighteenth Judicial Circuit Court of Florida

PETITION FOR WRIT OF MANDAMUS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the trial court's Modified Amended Permanent Injunction complied with this Court's Mandate.

2. Whether the trial court exceeded its authority by adding restrictions to the injunction without hearing any evidence to justify the restrictions.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

In addition to the Petitioners listed in the caption, Operation Rescue, Patrick Mahoney, Randall Terry, Bruce Cadle, Operation Rescue America, and Operation Goliath were listed as parties in the Eighteenth Judicial Circuit Court of Florida, but did not present oral argument. None of the Petitioners are active corporations.

The Respondents in this action, Women's Health Center, Inc.; Aware Women Center for Choice, Inc.; EPOC Clinic, Inc.; and Central Florida Women's Health Organization, Inc., are all incorporated in Florida and do not have parent or subsidiary companies.

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IN THE

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OCTOBER TERM, 1996

In re

JUDY MADSEN JOHNSON, ED MARTIN, SHIRLEY HOBBS and RESCUE AMERICA,

Petitioners.

On Petition for Writ of Mandamus to the Eighteenth Judicial Circuit Court of Florida

PETITION FOR WRIT OF MANDAMUS

Judy Madsen Johnson, Ed Martin, Shirley Hobbs and Rescue America respectfully petition for a writ of mandamus to compel the Eighteenth Judicial Circuit Court of Florida to comply with this Court's Mandate in *Madsen v. Women's Health Center, Inc*, 114 S. Ct 2516 (1994).

OPINIONS BELOW

The opinion of this Court striking certain provisions of the amended permanent injunction as unconstitutional is reproduced as Appendix A. *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994).

The mandate of this Court issued on June 30, 1994, remanding this cause to the Supreme Court of Florida for further proceedings not inconsistent with the opinion of this Court is reproduced as Appendix B.

The Modified Amended Permanent Injunction of the Eighteenth Judicial Circuit of Florida which modified the amended permanent injunction following this Court's mandate is reproduced as Appendix C. *Women's Health Center, Inc. v. Operation Rescue*, No. 91-2811-CA-16-L (Fla. Cir. Ct. Nov. 27, 1996).

The Amended Permanent Injunction of the Eighteenth Judicial Circuit of Florida is reproduced as Appendix D. *Women's Health Center, Inc. v. Operation Rescue*, No. 91-2811-CA-16-K (Fla. Cir. Ct. April 8, 1993).

STATEMENT OF JURISDICTION

The Modified Amended Permanent Injunction of the Eighteenth Judicial Circuit of Florida was entered on November 27, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. §1651(a).

CONSTITUTIONAL PROVISIONS AND INJUNCTION AT ISSUE

This case involves the First and Fourteenth Amendments

to the United States Constitution. The First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

U.S. Const. amend. I The Fourteenth Amendment provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

This case presents constitutional challenges to the Eighteenth Judicial Circuit of Florida's Modified Amended Permanent Injunction which has been reproduced as Appendix C.

STATEMENT OF THE CASE

It is the position of the Petitioners that the Modified Amended Permanent Injunction (hereinafter "Modified Injunction") (App. B) entered on November 27, 1996, by the Honorable Newman D. Brock, Circuit Judge in the Eighteenth Judicial Circuit of Florida, failed to comply with this Court's Mandate issued on June 30, 1994.

This case arose as the result of a speech-restrictive injunction which, among other things, created a "buffer zone" around an abortion clinic in Melbourne, Florida. In *Madsen v. Women's Health Center*, 114 S. Ct. 2516, this Court struck down as unconstitutional certain provisions of that injunction. Specifically, this Court wrote:

> We strike down as unconstitutional *the 36-foot buffer zone as applied to the private property to the north and west of the clinic, the "images observable" provision, the 300-foot no approach zone around the clinic, and the 300-foot buffer zone around the residences, because these provisions sweep more broadly than necessary to accomplish the permissible goals of the injunction.*

Id. at 2530 (emphasis supplied).

Furthermore, on June 30, 1994, this Court also issued a Mandate to the Supreme Court of Florida "for further proceedings not inconsistent with the opinion of this Court."

Thereafter, on October 30, 1996, the trial court in the Eighteenth Judicial Circuit of Florida held a hearing to modify the Amended Permanent Injunction in order to comply with the June 30, 1994, Mandate of this Court. The Respondents did not present any evidence to support any additions to the injunction. On November 27, 1996, Judge Newman D. Brock entered a Modified Amended Permanent Injunction which failed to strike the unconstitutional provisions and which included additional restrictions regarding residential picketing, the "images observable" provision, and invited contact.

REASONS FOR GRANTING THE WRIT

This Court issued specific instructions in *Madsen* to strike certain provisions of the Amended Permanent Injunction. This Court remanded the *Madsen* case and ordered the Supreme Court of Florida to hold further proceedings not inconsistent with this Court's opinion. However, instead of following this Court's instructions, the Eighteenth Judicial Circuit Court violated this Court's mandate in two ways. First, the court failed to implement this Court's order to strike the unconstitutional provisions of the injunction. Second, the trial court exceeded the mandate and added provisions to the injunction in the absence of any record evidence demonstrating a justification for such provisions. Consequently, a Writ of Mandamus should be issued to effectuate this Court's mandate regarding the injunction.

The Supreme Court has power to issue a Writ of Mandamus to effectuate its orders as contained in this Court's written opinions and mandates. Congress has empowered federal courts to issue writs of mandamus if necessary to effectuate or prevent frustration of orders previously issued. *Potomac Elec. Power Co. v. I.C.C.*, 702 F.2d 1026, 1032 (D.C. Cir. 1983); *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977). Specifically, 28 U.S.C. §1651(a) operates as an aid to the court's inherent power to determine whether a lower court has complied with a mandate. *Id.*, 702 F.2d at 1032. A writ of mandamus is appropriately issued when there is usurpation of judicial power or a clear abuse of discretion. *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). Mandamus may be used to compel a court to exercise authority when it has the duty to do so; mandamus is the proper remedy to enforce compliance with a mandate. *Whitlock's Estate v. C.I.R.*, 547 F.2d 506, 510 (10th Cir. 1976), cert. denied, 430 U.S. 916. Mandamus lies to *rectify*

a deviation by the trial court from the letter and spirit of the reviewing court's mandate, and the mandamus approach may appropriately be utilized to correct a misconception of scope and effect of the reviewing court's decision, or to prevent relitigation of issues already decided by the reviewing court. *Yablonski v. United Mine Workers of America*, 454 F.2d 1036, 1038 (D.C. Cir. 1971), cert. denied 406 U.S. 906.

This Court has the power to issue a Writ of Mandamus. *Ex parte Fahey*, 67 S. Ct. 1558 (1947). The trial court in this case has not complied with this Court's Mandate to strike certain provisions of the Amended Permanent Injunction. The trial court has gone beyond this Court's mandate and added provisions to the Amended Permanent Injunction without hearing evidence to support the additions. A Writ of Mandamus is necessary in this case to remedy the trial court's blatant violations of this Court's Mandate. The

> traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.

Will v. Calvert Fire Insurance Co., 437 U.S. 655, 661 (1978); *Bucolo v. Adkins*, 424 U.S. 641, 643 (1976).

Therefore, this Court should issue a Writ of Mandamus to confine the trial court to a lawful exercise of its prescribed jurisdiction and to compel the trial court to exercise its authority in striking the unconstitutional provision of the Amended Permanent Injunction as mandated by this Court.

I.

THE MODIFIED AMENDED PERMANENT INJUNCTION FAILED TO COMPLY WITH THIS COURT'S MANDATE TO STRIKE THE PROVISIONS OF THE AMENDED PERMANENT INJUNCTION WHICH THIS COURT STRUCK DOWN AS UNCONSTITUTIONAL.

In *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), this Court struck down several provisions of the Amended Permanent Injunction as unconstitutional In *Madsen*, this Court stated:

> We strike down as unconstitutional the 36-foot buffer zone as applied to the private property to the north and west of the clinic, *the "images observable" provision, the 300-foot no approach zone around the clinic, and the 300-foot buffer zone around the residences, because these provisions sweep more broadly than necessary to accomplish the permissible goals of the injunction.*

Madsen, 114 S. Ct. at 2530 (emphasis supplied). On June 30, 1994, this Court also issued a Mandate to the Supreme Court of Florida "for further proceedings not inconsistent with the opinion of this Court." (*See* Appendix B).

This Court's directions were clear. Pursuant to those instructions, the lower court was ordered to strike the unconstitutional provisions of the injunction. The trial court failed to follow this simple mandate. Instead, the trial court specifically disregarded this Court's mandate and chose to create a Modified Amended Permanent Injunction. Rather

than simply striking the unconstitutional provisions, the trial court rewrote the provisions and offered new, substantive restrictions on Petitioners' ability to exercise their free speech rights.

A. The 36-foot buffer zone around the clinic.

This Court examined the 36-foot buffer zone around the clinic which included both the public right-of-way and private property within 36 feet of the property line of the clinic. *Madsen*, 114 S. Ct. at 2526 - 2527. This Court noted that the 36-foot buffer zone was created by the trial court as a way of ensuring access to the clinic. *Id.* at 2526. This Court analyzed the portion of the buffer zone applying to the public right-of-way and the portion of the buffer zone applying to the private property separately. *Id.* at 2527.

The reason for the 36-foot buffer zone around the clinic is to protect access to the clinic and to facilitate the orderly flow of traffic on Dixie Way. *Id.* at 2527 - 2528. To that end, this Court upheld the 36-foot buffer zone around the clinic entrances and driveway because those portions of the buffer zone "burden no more speech than necessary to accomplish the governmental interest at stake." *Id.* at 2527.

Accordingly, any portion of the 36-foot buffer zone which do not serve the purpose of protecting access to the clinic and facilitate the orderly flow of traffic on Dixie Way must be struck down. That is precisely what this Court did to the portion of the 36-foot buffer zone applying to the private property on the back and side of the clinic. *Id.* at 2528. This Court reasoned:

> The accepted purpose of the buffer zone is to protect access to the clinic and to facilitate the orderly flow

> of traffic on Dixie Way. Patients and staff wishing to reach the clinic do not have to cross the private property abutting the clinic property on the north and west, and nothing in the record indicates that petitioners' activities on the private property have obstructed access to the clinic. Nor was evidence presented that protestors located on the private property blocked vehicular traffic on Dixie Way. Absent evidence that petitioners standing on the private property have obstructed access to the clinic, blocked vehicular traffic, or otherwise unlawfully interfered with the clinic's operation, this portion of the buffer zone fails to serve the significant government interests relied on by the Florida Supreme Court. We hold that on the record before us the 36-foot buffer zone as applied to the private property to the north and west of the clinic burdens more speech than necessary to protect access to the clinic.

Id. This Court "struck down as unconstitutional the 36-foot buffer zone as applied to the private property to the north and west of the clinic." *Id.* at 2530.

The trial court failed to comply with this Court's Mandate to strike all of the 36-foot buffer zone except that portion around the clinic entrances and driveway necessary to protect access to the clinic and facilitate orderly traffic flow on Dixie Way. Instead, the trial court left the entire 36-foot buffer zone in place with one exception.

In the Amended Permanent Injunction, reviewed by this Court, the 36-foot buffer zone around the clinic forbade the Petitioners:

At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within thirty-six (36) feet of the property line of the Clinic. The 36 foot buffer on the south side of the Clinic is demarcated by the south edge of paved surface of Dixie Way. It is the intent of the court that the respondents may use, subject to other restrictions contained herein, the unpaved portion (the shoulder) on the south side of Dixie Way. A drawing is attached hereto showing the various areas and lines. **An exception to the 36 foot buffer zone is the area immediately adjacent to the Clinic on the east, lying in the right-of-way of U.S. Highway One. This area is composed of a flat shoulder area rising up an embankment to the easterly property line of the Clinic. The respondents may enter the shoulder area of U.S. Highway One, but may not go up the embankment and must remain at least five (5) feet from the Clinic's east line. Another exception to the 36 foot buffer zone relates to the record title owners of the property to the north and west of the Clinic. The prohibition against entry into the 36 foot buffer zone does not apply to such persons and their invitees. The other prohibitions contained herein do apply, if such owners and their invitees are acting in concert with the respondents.** Another exception to the 36 foot buffer zone relates to the record title owners of the property to the north and west of the Clinic. The prohibition against entry into the 36 foot buffer zone does not apply to such persons and their invitees. The other prohibitions contained herein do apply, if such owners and their invitees are acting in concert

with the respondents. Another exception to the 36 foot buffer zone relates to the area of the pedestrian crosswalk near the area where Dixie Way enters into U.S. Highway One. The testimony before the Court revealed that such crosswalk is not presently marked by customary white lines. It is the request of this court, in order to assist the parties in complying with this injunction, that the City of Melbourne establish a crosswalk area at the eastern end of Dixie Way in customary manner by applying painted lines on the surface of the pavement. Until such lines are applied, the respondents may use an area of the paved surface of Dixie Way as a crosswalk, but must confine their use of such area to a strip of pavement eight (8) feet wide, running directly from the south edge of Dixie Way to the north edge thereof, the westerly line of such strip being coextensive with the western right-of-way line of U.S. Highway One. (See drawing attached.) After painted lines are applied, the respondents must not enter any portion of the paved surface of Dixie Way outside of the crosswalk within the 36 foot buffer zone. The respondents use of the crosswalk must be limited to the prompt crossing of the street. The crosswalk may not be used as an area of picketing, congregating or demonstrating. The respondents use of the crosswalk must not inhibit or impede the free flow of traffic on Dixie Way, and no stopping or hesitation in the crosswalk shall be allowed. (emphasis added).

Appendix D - 8-9. The trial court left this entire provision virtually intact, so that Petitioners continue to be prohibited:

At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within thirty-six (36) feet of the property line of the Clinic. The 36 foot buffer on the south side of the Clinic is demarcated by the south edge of paved surface of Dixie Way. It is the intent of the court that the respondents may use, subject to other restrictions contained herein, the unpaved portion (the shoulder) on the south side of Dixie Way. A drawing is attached hereto showing the various areas and lines. **An exception to the 36 foot buffer zone is the area immediately adjacent to the Clinic on the east, lying in the right-of-way of U.S. Highway One. This area is composed of a flat shoulder area rising up an embankment to the easterly property line of the Clinic. The respondents may enter the shoulder area of U.S. Highway One, but may not go up the embankment and must remain at least five (5) feet from the Clinic's east line. Another exception to the 36 foot buffer zone relates to the privately held property to the north and west of the Clinic. The prohibition against entry into the 36 foot buffer zone does not apply to such property. However, this provision of the injunction shall not be construed to preclude the owners of that private property from taking legal action to exclude respondents from their property, should the owners so desire.** Another exception to the 36 foot buffer zone relates to the area of the pedestrian crosswalk near the area where Dixie Way enters into U.S. Highway One. The testimony before the Court revealed that such crosswalk is not presently marked by customary white lines. It is the request of this

> court, in order to assist the parties in complying with this injunction, that the City of Melbourne establish a crosswalk area at the eastern end of Dixie Way in customary manner by applying painted lines on the surface of the pavement. Until such lines are applied, the respondents may use an area of the paved surface of Dixie Way as a crosswalk, but must confine their use of such area to a strip of pavement eight (8) feet wide, running directly from the south edge of Dixie Way to the north edge thereof, the westerly line of such strip being coextensive with the western right-of-way line of U.S. Highway One. (See drawing attached.) After painted lines are applied, the respondents must not enter any portion of the paved surface of Dixie Way outside of the crosswalk within the 36 foot buffer zone. The respondents use of the crosswalk must be limited to the prompt crossing of the street. The crosswalk may not be used as an area of picketing, congregating or demonstrating. The respondents use of the crosswalk must not inhibit or impede the free flow of traffic on Dixie Way, and no stopping or hesitation in the crosswalk shall be allowed. (emphasis added).

Appendix C - 8-9. This Court clearly stated that the reason it upheld the provision of the 36-foot buffer zone at the clinic entrance and driveway was to protect *access* to the clinic and ensure orderly traffic flow on Dixie Way. *Madsen*, 114 S. Ct at 2527, 2528. This Court struck down the provision of the 36-foot buffer zone on the private property to the north and west of the clinic because that provision did not further the purpose of access to the clinic and orderly traffic flow on Dixie Way, and therefore burdened more speech than necessary. Each part of the 36-foot buffer zone must similarly

be stricken if it does not further the purpose of protecting access to the clinic and ensuring traffic flow on Dixie Way. This analysis must be based on the record before this Court since no further evidence or testimony has been presented.

Therefore, the provision stating that the Petitioners may enter the shoulder area of U.S. Highway 1, but may not go up the embankment and must remain at least five feet from the Clinic's east line must be stricken. That provision does not serve to protect access to the clinic entrance nor ensure orderly traffic flow on Dixie Way. The trial court's failure to strike all of this provision except for the portion pertaining to the clinic and driveway violates this Court's Mandate.

B. The "images observable" provision.

This Court struck down as unconstitutional the "images observable" provision of the Amended Permanent Injunction. *Madsen*, 114 S. Ct. at 2530. In the Amended Permanent Injunction, the "images observable" provision forbade Petitioners:

> During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic.

Id. at 2522. The trial court failed to follow this Court's explicit Mandate to strike this provision. Rather, Judge Brock simply attempted to rephrase the "images observable" provision without hearing any new testimony to support its newly created prohibition. The rephrased "images

observable" provision in the Modified Injunction now forbids Petitioners:

> During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, using bullhorns, auto horns, sound amplification equipment or other sounds, or images which convey threats, veiled or otherwise, observable to or within earshot of the patients inside the Clinic.

Appendix C - 9. The only difference between the provision this Court struck down and Judge Brock's new provision is the insertion of the words "which convey threats, veiled or otherwise." This rewording leaves the constitutionally deficient prohibition intact. In addressing the "images observable" provision, this Court noted that the provision burdened more speech than necessary. *Id.* at 2528. On that issue, this Court wrote:

> Clearly, threats to patients or their families, however communicated, are proscribable under the First Amendment. But rather than prohibiting the display of signs that could be interpreted as threats or veiled threats, the state court issued a blanket ban on all "images observable." This broad prohibition of all "images observable" burdens more speech than necessary to achieve the purpose of limiting threats to clinic patients or their families.

Id. at 2529. Since the trial court only reworded the "images observable" provision instead of striking it, the trial court violated this Court's Mandate.

C. The 300-foot buffer zone around the residences.

This Court also struck down the 300-foot buffer zone around the residences. In the Amended Permanent Injunction, this provision forbade Petitioners:

> At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within [300] feet of the residence of any of the [Respondents'] employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the [Respondents'] employees, staff, owners or agents. The [Petitioners] and those acting in concert with them are prohibited from inhibiting or impeding or attempting to impede, temporarily or otherwise, the free ingress or egress of persons to any street that provides the sole access to the street on which those residences are located.

Id. 114 S. Ct. at 2522. In striking down this provision as unconstitutional, this Court contrasted the 300-foot buffer zone with the ordinance at issue in *Frisby v. Schultz*, 487 U.S.474 (1988), where an ordinance banning targeted residential picketing was upheld. *Madsen*, 114 S. Ct. at 2529 - 2530. In making that contrast, this Court stated:

> the 300-foot zone around the residences in this case is much larger than the zone provided for in the ordinance which we approved in *Frisby*. . . .The prohibition [in *Frisby*] was limited to "focused picketing taking place solely in front of a particular residence." . . .By contrast, the 300-foot zone would

> ban "[g]eneral marching through residential neighborhoods, or even walking a route in front of an entire block of houses." *Ibid.* **The record before us does not contain sufficient justification for this broad a ban on picketing; it appears that a limitation on the time, duration or picketing, and number of pickets outside a smaller zone could have accomplished the desired results.**

Madsen, 114 S. Ct. at 2530.(emphasis supplied).

Rather than simply striking this unconstitutional provision, Judge Brock in his Modified Injunction rephrased the provision, leaving the 300-foot buffer zone virtually intact and adding further restrictions. This addition of new restrictions was occurred without the introduction of any new evidence to justify it. The provision in Judge Brock's Modified Injunction states:

> Respondents and those acting in concert with them may not approach, congregate, picket, patrol, demonstrate, use bullhorns or other sound amplification equipment within three hundred feet of the residences or temporary residences of any of the petitioners' employees, staff, owners or agents (referred here collectively as petitioners) except as follows:
>
> a. Respondents may engage in peaceful marching and picketing on weekdays, excluding national holidays, from 10:00 a.m. to 12:00 p.m. However, such picketing and marching shall be limited to the sidewalk, or if none, the shoulder of the road, across the street from petitioners' residences or temporary residences. Furthermore, such picketing and

> marching shall not, momentarily or otherwise, impede the absolute free ingress or egress of petitioners or petitioners' neighbors on the roadways providing access to the streets on which petitioners' homes are located, the streets themselves upon which petitioners' residences are located or the driveways of petitioners' or their neighbors' residences.
>
> b. The number of picketers and marchers shall be limited to twenty-five at any one time.
>
> c. No communications, either by pickets, audible sound or conduct, which convey threats or veiled threats shall be permitted.

Appendix C - 10. The record before this Court is the same record before Judge Brock. No new or additional testimony or evidence was introduced. This Court said the record lacked evidence to support the 300 foot buffer zone. Yet Judge Brock not only kept the zone, he also added new restrictions. The trial court's failure to strike the 300-foot buffer zone around the residences violates this Court's mandate.

Further, the trial court left intact a provision regarding "invited contact" at the residences of the Respondents, even though this Court held such "consent" requirements are invalid. *Madsen*, 114 S. Ct. at 2529. The Amended Permanent Injunction stated:

> **ORDERED AND ADJUDGED** that at all times on all days, respondents will have the right of invited contact with persons protected hereby so long as it is outside of the Clinic buffer zone. "Invited contact" is defined as conduct by the person sought to be

> contacted which affirmatively indicates a desire to engage in conversation or to receive literature. Such affirmative indication may include where the person sought to be contacted physically approaches the respondent, or where such person extends his or her hand to receive literature, or speaks words indicating a positive interest in what the respondent is saying. Such invited contact by a person protected hereby as it relates to a contact at such persons residence is limited to conduct transmitted by the resident to a respondent at a distance from and at a time prior to the contact and shall not include the uninvited ringing of a doorbell or knock on a door. Any invited contact may be canceled by such person by words spoken that indicate a desire to end the contact, such as "stop", "withdraw", "back off", "get away", "leave me alone" or words or actions of similar import. Where such desire to end the contact is made known to a respondent, he/she must immediately terminate the contact and leave the presence of the person protected hereby.

Appendix D - 13. This Court struck down this same type of invited contact provision in regard to the 300-foot no-approach zone around the clinic. *Madsen*, 114 S. Ct. at 2529. This Court stated:

> [I]t is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protesters' speech is independently proscribable (i.e., "fighting words" or threats), or is so infused with

> violence as to be indistinguishable from a threat of physical harm . . . this provision cannot stand. "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.[citation omitted]. The "consent" requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.

Id., 114 S. Ct. at 2529.(emphasis in original). The same reasoning applies to this provision requiring invited contact at the Respondents' residences. However, the trial court failed to remove all of the provisions regarding invited contact at the residences. This provision in the Modified Amendment Permanent Injunction states:

> **ORDERED AND ADJUDGED** that at all times on all days, respondents will have the right of contact with persons protected hereby so long as it is outside of the Clinic buffer zone. However, such contact by a person protected hereby as it relates to a contact at such persons residence or the curtilage thereof is limited to conduct transmitted by the resident to a respondent at a distance from and at a time prior to the contact and shall not include the uninvited ringing of a doorbell or knock on a door. Any such contact may be canceled by such person by words spoken that indicate a desire to end the contact, such as "stop", "withdraw", "back off", "get away", "leave me alone" or words or actions of similar import. Where such desire to end the contact is made known to a respondent, he/she must immediately terminate the contact and leave the

protected hereby.

Appendix C - 13. The consent requirement is still intact by requiring that contact be limited to conduct transmitted by the resident to a Petitioner at a distance from and at a time prior to the contact. The consent requirement is still intact by prohibiting Petitioners from ringing doorbells and knocking on doors if uninvited to do so. This provision is unconstitutional for the same reasons the no-approach zone around the residences is unconstitutional: the provision burdens more speech than is necessary to prevent intimidation and ensure access to the residences. The trial court's failure to strike this invited contact provision from the injunction violates this Court's Mandate.

D. The 300-foot no-approach zone around the clinic.

This Court also struck down the 300-foot no-approach zone around the clinic as unconstitutional. In the Amended Permanent Injunction, this unconstitutional provision forbade Petitioners:

> At all times on all days, in an area within [300] feet of the Clinic, from physically approaching any person seeking services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [petitioners]...

Madsen, 114 S. Ct. at 2522. In reviewing this provision, this Court wrote:

> [I]t is difficult, indeed, to justify a prohibition on <u>all</u> uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact

> may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protesters' speech is independently proscribable (i.e., "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm . . . this provision cannot stand. "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.[citation omitted]. The "consent" requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.

Id., 114 S. Ct. at 2529. (emphasis in original).

Again, rather than simply striking this unconstitutional provision as directed by this Court's mandate, Judge Brock simply attempted to rewrite the unconstitutional provision. The Modified Injunction's rephrased provision states:

> Outside of the 36 foot buffer zone, respondents and those acting in concert with them may physically approach persons seeking the services of the clinic to engage in non-threatening communications and to distribute literature. However, at all times and on all days, should any individual decline such communication, otherwise known as "sidewalk counseling," that person shall have the absolute right to leave or walk away and the respondents shall not encircle, surround, impede the progress of, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with

them.

Appendix C - 9-10. Again, Judge Brock had no new or additional evidence. Obviously, the trial court once again violated this Court's Mandate and failed to strike the "no-approach" provision.

In each case, the trial court failed to follow this Court's specific Mandate to strike the unconstitutional provisions. Instead, Judge Brock deviated from the letter and spirit of this Court's Mandate. Therefore, in order to effectuate this Court's Mandate, the Petitioners request that this honorable Court issue a Writ of Mandamus compelling the trial court to comply with the Mandate and strike the five unconstitutional provisions. *Potomac Elec. Power Co.*, 702 F.2d at 1032; *Whitlock's Estate*, 547 F.2d at 510; *Yablonski*, 454 F.2d at 1038.

II.

THE TRIAL COURT EXCEEDED ITS AUTHORITY BY ADDING RESTRICTIONS TO THE INJUNCTION WITHOUT HEARING ANY EVIDENCE TO JUSTIFY THE RESTRICTIONS.

Judge Brock exceeded this Court's Mandate by adding even further unconstitutional restrictions to free speech. Judge Brock failed to follow the guidelines announced in Madsen. Judge Brock's further restrictions are not supported by record evidence.

The trial court not only failed to strike the unconstitutional provisions as mandated by this Court, the court went beyond the scope of this Court's Mandate by

adding new restrictions on the Petitioners' ability to exercise their free speech rights. The Modified Injunction is directed against certain named Respondents, including Judy Madsen, Ed Martin and Shirley Hobbs, the Petitioners. The last time evidence was entered into the record in this case was almost four years ago during an evidentiary trial conducted from March 31, 1993, through April 2, 1993, regarding modification of the Permanent Injunction. Since that time, Judge Brock has not heard any additional testimony regarding the Petitioners or the need for further equitable relief.

In *Madsen*, this Court created a new test regarding injunctions which affect speech. This Court stated that under general equity principles, injunctive relief affecting speech is permissible only upon a showing that: (1) the defendant has violated, or imminently will violate, some provision of statutory or common law;[1] (2) there is a cognizable danger of recurrent violation;[2] (3) a non-speech-restrictive injunction preventing the repeated illegal conduct has proven ineffective to protect the significant government interests because the defendant has repeatedly violated the injunction;[3] and, of course, (4) a subsequent speech-restrictive injunction may not burden more speech than necessary to serve a significant government interest.[4]

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[1] *Madsen*, 114 S. Ct. at 2524 n.3 (quoting *United States v. W. T. Grant Company*, 345 U.S. 629, 633 (1953)).

[2] *Id.*

[3] *Id.* at 2526-27.

[4] *Id.* at 2525-26; *see* Mathew D. Staver, *Injunctive Relief and the* Madsen *Test*, 14:2 ST. LOUIS U.PUB.L.REV. 456-494 (1995).

The first two prongs of the above test are applicable to any injunction because injunctive relief is an equitable remedy.[5] Thus, prongs one and two must be met before the entry of any equitable relief. After prongs one and two are met, a court must attempt to restore law and order by a non-speech-restrictive injunction, and only after that injunction proves to be ineffective may a subsequent speech-restrictive injunction be issued. Yet, even the speech-restrictive injunction may not burden more speech than necessary to serve a significant government interest. *Madsen*, 114 S. Ct. at 2525-26.

Since this Court's Mandate on June 30, 1994, no new evidence has been introduced into the record at all. As a result, the trial court had no new evidence stating that the Petitioners have violated, or imminently will violate, some provision of statutory or common law. Therefore the first prong of the *Madsen* test has not been met. Obviously if there is no evidence that the Petitioners have violated or will violate the law, there can be no a cognizable danger of recurrent violation. Accordingly, the second prong of the *Madsen* test has not been met. Failure to meet these two prongs means the trial court had no basis for creating additional injunctive relief, especially when that injunctive relief restricts Petitioners' speech. If the Respondents desired further equitable relief, they were obligated to present evidence of the need for further equitable relief. The Respondents failed to present any additional evidence. Absent such evidence, further equitable relief should not be granted. Therefore, the additional restrictions are improper.

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[5] *Madsen*, 114 S. Ct. at 2524 n.3.

CONCLUSION

In light of the reasons stated above, the Petitioners respectfully request this Court to issue a Writ of Mandamus to the Eighteenth Judicial Circuit Court of Florida.

Respectfully Submitted,

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February 20, 1997

APPENDIX A

JUDY MADSEN, ET AL., PETITIONERS
v.
WOMEN'S HEALTH CENTER, INC., ET AL.

No. 93-880

April 28, 1994, Argued
June 30, 1994, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

SYLLABUS:

After petitioners and other antiabortion protesters threatened to picket and demonstrate around a Florida abortion clinic, a state court permanently enjoined petitioners from blocking or interfering with public access to the clinic, and from physically abusing persons entering or leaving it. Later, when respondent clinic operators sought to broaden the injunction, the court found that access to the clinic was still being impeded, that petitioners' activities were having deleterious physical effects on patients and discouraging some potential patients from entering the clinic, and that doctors and clinic workers were being subjected to protests at their homes. Accordingly, the court issued an amended injunction, which applies to petitioners and persons acting "in concert" with them, and which, inter alia, excludes demonstrators from a 36-foot buffer zone around the clinic entrances and driveway and the private property to the north and west of the clinic; restricts excessive noisemaking within the earshot of, and the use of "images observable" by, patients inside the clinic; prohibits protesters within a 300-foot zone around the clinic

from approaching patients and potential patients who do not consent to talk; and creates a 300-foot buffer zone around the residences of clinic staff. In upholding the amended injunction against petitioners' claim that it violated their First Amendment right to freedom of speech, the Florida Supreme Court recognized that the forum at issue is a traditional public forum; refused to apply the heightened scrutiny dictated by *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45, because the injunction's restrictions are content neutral; and concluded that the restrictions were narrowly tailored to serve a significant government interest and left open ample alternative channels of communication, see *ibid.*

Held:

1. The ordinance at issue is not subject to heightened scrutiny as content or viewpoint-based simply because it restricts only the speech of antiabortion protesters. To accept petitioners' claim to the contrary would be to classify virtually every injunction as content based. An injunction, by its very nature, does not address the general public, but applies only to particular parties, regulating their activities, and perhaps their speech, because of their past actions in the context of a specific dispute. The fact that this injunction did not prohibit activities by persons demonstrating in favor of abortion is justly attributable to the lack of such demonstrations and of any consequent request for relief. Moreover, none of the restrictions at issue were directed at the content of petitioners' antiabortion message. The principal inquiry in determining content neutrality is whether the government has regulated speech without reference to its content. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 791. The government's purpose is therefore the threshold consideration. Here, the injunction imposed incidental restrictions on petitioners' message because they repeatedly violated the original

injunction. That the injunction covers people who all share the same viewpoint suggests only that those in the group whose conduct violated the court's order happen to share that viewpoint. Pp. 2523-2524.

2. In evaluating a content-neutral injunction, the governing standard is whether the injunction's challenged provisions burden no more speech than necessary to serve a significant government interest. See, e.g., *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175, 184. Thus, the injunction must be couched in the narrowest terms that will accomplish its pin-pointed objective. See *id.*, at 183. Although the forum around the clinic is a traditional public forum, the obvious differences between a generally applicable ordinance--which represents a legislative choice to promote particular societal interests--and an injunction--which remedies an actual or threatened violation of a legislative or judicial decree, and carries greater risks of censorship and discriminatory application than an ordinance, but can be tailored to afford greater relief where a violation of law has already occurred-- require a somewhat more stringent application of general First Amendment principles in this context than traditional time, place, and manner analysis allows. The combination of the governmental interests identified by the Florida Supreme Court--protecting a pregnant woman's freedom to seek lawful medical or counseling services, ensuring public safety and order, promoting the free flow of traffic on public streets and sidewalks, protecting citizens' property rights, and assuring residential privacy--is quite sufficient to justify an appropriately tailored injunction. Pp. 2524-2527.

3. Given the focus of the picketing on patients and clinic staff, the narrowness of the confines around the clinic, the fact that protesters could still be seen and heard from the clinic parking

lots, and the failure of the first injunction to accomplish its purpose, the 36-foot buffer zone around the clinic entrances and driveway, on balance, burdens no more speech than necessary to accomplish the governmental interests in protecting access to the clinic and facilitating an orderly traffic flow on the street. The need for a complete buffer zone may be debatable, but some deference must be given to the state court's familiarity with the facts and the background of the dispute even under heightened review. Petitioners argued against including the factual record as an appendix in the Florida Supreme Court, and never certified a full record. This Court must therefore judge the case on the assumption that the evidence and testimony presented to the state court supported its findings that the protesters' activities near the clinic's entrance interfered with access despite the earlier injunction. Pp. 2527-2528

4. However, the 36-foot buffer zone as applied to the private property to the north and west of the clinic burdens more speech than necessary to protect access to the clinic. Patients and staff wishing to reach the clinic do not have to cross that property. Moreover, nothing in the record indicates that petitioners' activities on the property have obstructed clinic access, blocked vehicular traffic, or otherwise unlawfully interfered with the clinic's operation. P. 2528.

5. The limited noise restrictions imposed by the injunction burden no more speech than necessary to ensure the health and well-being of the clinic's patients. Noise control is particularly important around medical facilities during surgery and recovery periods. The First Amendment does not demand that patients at such a facility undertake Herculean efforts to escape the cacophony of political protests. Pp. 2528-2529.

6. The blanket ban on "images observable" sweeps more

broadly than necessary to accomplish the goals of limiting threats to clinic patients or their families and reducing the patients' level of anxiety and hypertension inside the clinic. Prohibiting the display of signs that could be interpreted as threats or veiled threats would satisfy the first goal, while a clinic could simply pull its curtains to protect a patient bothered by a disagreeable placard. Pp. 2528-2529.

7. Absent evidence that the protesters' speech is independently proscribable (i.e, "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, the 300-foot no-approach zone around the clinic--and particularly its consent requirement--burdens more speech than is necessary to accomplish the goals of preventing intimidation and ensuring access to the clinic. Pp. 2529.

8. The 300-foot buffer zone around staff residences sweeps more broadly than is necessary to protect the tranquility and privacy of the home. The record does not contain sufficient justification for so broad a ban on picketing; it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired results. As to the use of sound amplification equipment within the zone, however, the government may demand that petitioners turn down the volume if the protests overwhelm the neighborhood. Pp. 2529-2530.

9. Petitioners, as named parties in the injunction, lack standing to challenge its "in concert" provision as applied to persons who are not parties. Moreover, that phrase is not subject, at petitioners' behest, to a challenge for "overbreadth." See *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14-15. Nor does the "in concert" provision impermissibly burden their freedom of association. They are not enjoined from associating with others or from joining with them to

express a particular viewpoint, and the First Amendment does not protect joining with others to deprive third parties of their lawful rights. Pp. 2530.

626 So. 2d 664, affirmed in part and reversed in part.

JUDGES: REHNQUIST, C. J., delivered the opinion of the Court, in which BLACKMUN, O'CONNOR, SOUTER, and GINSBURG, JJ., joined, and in which STEVENS, J., joined as to Parts I, II, III-E, and IV. SOUTER, J., filed a concurring opinion. STEVENS, J., filed an opinion concurring in part and dissenting in part. SCALIA, J., filed an opinion concurring in the judgment in part and dissenting in part, in which KENNEDY and THOMAS, JJ., joined.

MATHEW D. STAVER, Orlando, FL, for petitioners.

TALBOT D'ALEMBERTE, Miami, FL, for respondents.

DREW S. DAYS, III, New York City, for the U.S. as amicus curiae, by special leave of the Court.

OPINION BY: REHNQUIST

OPINION: CHIEF JUSTICE REHNQUIST delivered the opinion of the Court.

Petitioners challenge the constitutionality of an injunction entered by a Florida state court which prohibits antiabortion protestors from demonstrating in certain places and in various ways outside of a health clinic that performs abortions. We hold that the establishment of a 36-foot buffer zone on a public street from which demonstrators are excluded passes

muster under the First Amendment, but that several other provisions of the injunction do not.

I

Respondents operate abortion clinics throughout central Florida. Petitioners and other groups and individuals are engaged in activities near the site of one such clinic in Melbourne, Florida. They picketed and demonstrated where the public street gives access to the clinic. In September 1992, a Florida state court permanently enjoined petitioners from blocking or interfering with public access to the clinic, and from physically abusing persons entering or leaving the clinic. Six months later, respondents sought to broaden the injunction, complaining that access to the clinic was still impeded by petitioners' activities and that such activities had also discouraged some potential patients from entering the clinic, and had deleterious physical effects on others. The trial court thereupon issued a broader injunction, which is challenged here.

The court found that, despite the initial injunction, protesters continued to impede access to the clinic by congregating on the paved portion of the street--Dixie Way--leading up to the clinic, and by marching in front of the clinic's driveways. It found that as vehicles heading toward the clinic slowed to allow the protesters to move out of the way, "sidewalk counselors" would approach and attempt to give the vehicle's occupants antiabortion literature. The number of people congregating varied from a handful to 400, and the noise varied from singing and chanting to the use of loudspeakers and bullhorns.

The protests, the court found, took their toll on the clinic's patients. A clinic doctor testified that, as a result of having to

run such a gauntlet to enter the clinic, the patients "manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures." App. 54. The noise produced by the protestors could be heard within the clinic, causing stress in the patients both during surgical procedures and while recuperating in the recovery rooms. And those patients who turned away because of the crowd to return at a later date, the doctor testified, increased their health risks by reason of the delay.

Doctors and clinic workers, in turn, were not immune even in their homes. Petitioners picketed in front of clinic employees' residences; shouted at passersby; rang the doorbells of neighbors and provided literature identifying the particular clinic employee as a "baby killer." Occasionally, the protestors would confront minor children of clinic employees who were home alone. This and similar testimony led the state court to conclude that its original injunction had proved insufficient "to protect the health, safety and rights of women in Brevard and Seminole County, Florida, and surrounding counties seeking access to [medical and counseling] services." *Id.*, at 5. The state court therefore amended its prior order, enjoining a broader array of activities. The amended injunction prohibits petitioners[1] from engaging in the following acts:

"(1) At all times on all days, from entering the premises

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[1] In addition to petitioners, the state court's order was directed at "Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and . . . Bruce Cadle, Pat Mahoney, Randall Terry, . . . and all persons acting in concert or participation with them, or on their behalf." App. 56.

and property of the Aware Woman Center for Choice [the Melbourne clinic] . . . .

"(2) At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic.

"(3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within [36] feet of the property line of the Clinic . . . . An exception to the 36 foot buffer zone is the area immediately adjacent to the Clinic on the east . . . . The [petitioners] . . . must remain at least [5] feet from the Clinic's east line. Another exception to the 36 foot buffer zone relates to the record title owners of the property to the north and west of the Clinic. The prohibition against entry into the 36 foot buffer zones does not apply to such persons and their invitees. The other prohibitions contained herein do apply, if such owners and their invitees are acting in concert with the [petitioners]. . . .

"(4) During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic.

"(5) At all times on all days, in an area within [300] feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [petitioners]. . . .

"(6) At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within [300] feet of the residence of any of the [respondents'] employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the [respondents'] employees, staff, owners or agents. The [petitioners] and those acting in concert with them are prohibited from inhibiting or impeding or attempting to impede, temporarily or otherwise, the free ingress or egress of persons to any street that provides the sole access to the street on which those residences are located.

"(7) At all times on all days, from physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or leaving, working at or using services at the [respondents'] Clinic or trying to gain access to, or leave, any of the homes of owners, staff or patients of the Clinic.

"(8) At all times on all days, from harassing, intimidating or physically abusing, assaulting or threatening any present or former doctor, health care professional, or other staff member, employee or volunteer who assists in providing services at the [respondents'] Clinic.

"(9) At all times on all days, from encouraging, inciting, or securing other persons to commit any of the prohibited acts listed herein." *Operation Rescue v. Women's Health Center, Inc.*, 626 So. 2d 664, 679-680 (Fla. 1993).

The Florida Supreme Court upheld the constitutionality of the trial court's amended injunction. 626 So. 2d 664. That court recognized that the forum at issue, which consists of

public streets, sidewalks, and rights-of-way, is a traditional public forum. *Id.*, at 671, citing *Frisby v. Schultz*, 487 U.S. 474, 480 (1988). It then determined that the restrictions are content neutral, and it accordingly refused to apply the heightened scrutiny dictated by *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983) (To enforce a content-based exclusion the State must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end). Instead, the court analyzed the injunction to determine whether the restrictions are "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Id.*, at 45. It concluded that they were.

Shortly before the Florida Supreme Court's opinion was announced, the United States Court of Appeals for the Eleventh Circuit heard a separate challenge to the same injunction. The Court of Appeals struck down the injunction, characterizing the dispute as a clash "between an actual prohibition of speech and a potential hinderance to the free exercise of abortion rights." *Cheffer v. McGregor*, 6 F. 3d 705, 711 (1993). It stated that the asserted interests in public safety and order were already protected by other applicable laws and that these interests could be protected adequately without infringing upon the First Amendment rights of others. *Ibid.* The Court of Appeals found the injunction to be content based and neither necessary to serve a compelling state interest nor narrowly drawn to achieve that end. *Ibid.*, citing *Carey v. Brown*, 447 U.S. 455, 461-462 (1980). We granted certiorari, 510 U.S. ___ (1994), to resolve the conflict between the Florida Supreme Court and the Court of Appeals over the constitutionality of the state court's injunction.

II

We begin by addressing petitioners' contention that the state court's order, because it is an injunction that restricts only the speech of antiabortion protesters, is necessarily content or viewpoint based. Accordingly, they argue, we should examine the entire injunction under the strictest standard of scrutiny. See Perry Education Assn., supra, at 45. We disagree. To accept petitioners' claim would be to classify virtually every injunction as content or viewpoint based. An injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group. It does so, however, because of the group's past actions in the context of a specific dispute between real parties. The parties seeking the injunction assert a violation of their rights; the court hearing the action is charged with fashioning a remedy for a specific deprivation, not with the drafting of a statute addressed to the general public.

The fact that the injunction in the present case did not prohibit activities of those demonstrating in favor of abortion is justly attributable to the lack of any similar demonstrations by those in favor of abortion, and of any consequent request that their demonstrations be regulated by injunction. There is no suggestion in this record that Florida law would not equally restrain similar conduct directed at a target having nothing to do with abortion; none of the restrictions imposed by the court were directed at the contents of petitioner's message.

Our principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech "without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks omitted) (upholding noise regulations); *R. A. V. v. St. Paul*, 505 U.S. ___, ___ (1992) (slip op., at 8) ("The government may not regulate [speech] based on hostility--or favoritism--towards the underlying

message expressed"); see also *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987); *Regan v. Time, Inc.*, 468 U.S. 641, 648-649 (1984); *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 514-515 (1981) (plurality); *Carey v. Brown*, 447 U.S. 455, 466-468 (1980). We thus look to the government's purpose as the threshold consideration. Here, the state court imposed restrictions on petitioners incidental to their antiabortion message because they repeatedly violated the court's original order. That petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order. It suggests only that those in the group whose conduct violated the court's order happen to share the same opinion regarding abortions being performed at the clinic. In short, the fact that the injunction covered people with a particular viewpoint does not itself render the injunction content or viewpoint based. See *Boos v. Barry*, 485 U.S. 312 (1988).[2] Accordingly, the injunction issued in this case does not demand the level of heightened scrutiny set forth in *Perry Education Assn.*, 460 U.S., at 45. And we proceed

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[2] We also decline to adopt the prior restraint analysis urged by petitioners. Prior restraints do often take the form of injunctions. See, e.g., *New York Times Co. v. United States*, 403 U.S. 713 (1971) (refusing to enjoin publications of the "Pentagon Papers"); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (per curiam) (holding that Texas public nuisance statute which authorized state judges, on the basis of a showing that a theater had exhibited obscene films in the past, to enjoin its future exhibition of films not yet found to be obscene was unconstitutional as authorizing an invalid prior restraint.) Not all injunctions which may incidentally affect expression, however, are "prior restraints" in the sense that that term was used in New York Times Co., supra, or Vance, supra. Here petitioners are not prevented from expressing their message in any one of several different ways; they are simply prohibited from expressing it within the 36-foot buffer zone. Moreover, the injunction was issued not because of the content of petitioners' expression, as was the case in New York Times Co. and Vance, but because of their prior unlawful conduct.

to discuss the standard which does govern.

III

If this were a content-neutral, generally applicable statute, instead of an injunctive order, its constitutionality would be assessed under the standard set forth in *Ward v. Rock Against Racism, supra*, at 791, and similar cases. Given that the forum around the clinic is a traditional public forum, see *Frisby v. Schultz*, 487 U.S., at 480, we would determine whether the time, place, and manner regulations were "narrowly tailored to serve a significant governmental interest." *Ward, supra*, at 791. See also *Perry Education Assn., supra*, at 45.

There are obvious differences, however, between an injunction and a generally applicable ordinance. Ordinances represent a legislative choice regarding the promotion of particular societal interests. Injunctions, by contrast, are remedies imposed for violations (or threatened violations) of a legislative or judicial decree. See *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-633 (1953). Injunctions also carry greater risks of censorship and discriminatory application than do general ordinances. "There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112-113 (1949). Injunctions, of course, have some advantages over generally applicable statutes in that they can be tailored by a trial judge to afford more precise relief than a statute where a violation of the law has already occurred. *United States v. Paradise*, 480 U.S. 149 (1987).

We believe that these differences require a somewhat more

stringent application of general First Amendment principles in this context.[3] In past cases evaluating injunctions restricting speech, see, e.g., *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941), we have relied upon such general principles while also seeking to ensure that the injunction was no broader than necessary to achieve its desired goals. See *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968); *Claiborne Hardware, supra*, at 912, n. 47. Our close attention to the fit between the objectives of an injunction and the restrictions it imposes on speech is consistent with the general rule, quite apart from First Amendment considerations, "that injunctive relief should be no more burdensome to the defendants than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). See also *Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 418-420 (1977). Accordingly, when evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest. See, e.g., *Claiborne Hardware, supra*, at 916 (when sanctionable "conduct occurs in the context of constitutionally protected activity . . . 'precision of regulation' is demanded") (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)); 458 U.S., at 916, n. 52 (citing *Carroll, supra*, and *Keyishian v. Board of Regents, State Univ. of N.Y.*, 385 U.S. 589, 604 (1967)); *Carroll, supra*, at 183-184.

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[3] Under general equity principles, an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, and that there is a "cognizable danger of recurrent violation." *United States v. W. T. Grant Co.*, 345 U. S. 629, 633 (1953).

Both JUSTICE STEVENS and JUSTICE SCALIA disagree with the standard we announce, for policy reasons. See post, at 2 (STEVENS, J.); post, at 8-14 (SCALIA, J.). JUSTICE STEVENS believes that "injunctive relief should be judged by a more lenient standard than legislation," because injunctions are imposed on individuals or groups who have engaged in illegal activity. Post, at 2. JUSTICE SCALIA, by contrast, believes that content-neutral injunctions are "at least as deserving of strict scrutiny as a statutory, content-based restriction." Post, at 9. JUSTICE SCALIA bases his belief on the danger that injunctions, even though they might not "attack content as content," may be used to suppress particular ideas; that individual judges should not be trusted to impose injunctions in this context; and that an injunction is procedurally more difficult to challenge than a statute. Post, at 9-11. We believe that consideration of all of the differences and similarities between statutes and injunctions supports, as a matter of policy, the standard we apply here.

JUSTICE SCALIA further contends that precedent compels the application of strict scrutiny in this case. Under that standard, we ask whether a restriction is "'necessary to serve a compelling state interest and [is] narrowly drawn to achieve that end.'" Post, at 7 (quoting *Perry Education Assn.*, 460 U.S., at 45). JUSTICE SCALIA fails to cite a single case, and we are aware of none, in which we have applied this standard to a content-neutral injunction. He cites a number of cases in which we have struck down, with little or no elaboration, prior restraints on free expression. See post, at 15 (citing cases). As we have explained, however, we do not believe that this injunction constitutes a prior restraint, and we therefore believe that the "heavy presumption" against its constitutionality does not obtain here. See n. 2, supra.

JUSTICE SCALIA also relies on Claiborne Hardware and

Carroll for support of his contention that our precedent requires the application of strict scrutiny in this context. In Claiborne Hardware, we stated simply that "precision of regulation" is demanded. See 458 U.S., at 916 (internal quotation marks omitted). JUSTICE SCALIA reads this case to require "surgical precision" of regulation, post, at 16, but that was not the adjective chosen by the author of the Court's opinion, JUSTICE STEVENS. We think a standard requiring that an injunction "burden no more speech than necessary" exemplifies "precision of regulation."[4]

As for Carroll, JUSTICE SCALIA believes that the "standard" adopted in that case "is strict scrutiny," which "does not remotely resemble the Court's new proposal." Post, at 17. Comparison of the language used in Carroll and the wording of the standard we adopt, however, belies JUSTICE SCALIA'S exaggerated contention. Carroll, for example, requires that an injunction be "couched in the narrowest terms that will accomplish the pin-pointed objective" of the injunction. 393 U.S., at 183. We require that the injunction "burden no more speech than necessary" to accomplish its objective. We fail to see a difference between the two standards.

The Florida Supreme Court concluded that numerous significant government interests are protected by the injunction. It noted that the State has a strong interest in

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[4] In stating that "precision of regulation" is required in *Claiborne Hardware*, moreover, we cited both to *Carroll v. President and Comm'rs of Princess Anne*, 393 U.S. 175 (1968), a case involving an injunction, and to *Keyishian v. Board of Regents, State Univ. of N.Y.*, 385 U.S. 589 (1967), a case involving a state statute and regulations. If our precedent demanded the different treatment of statutes and injunctions, as JUSTICE SCALIA claims, it is difficult to explain our reliance on Keyishian in Claiborne.

protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy. See *Roe v. Wade*, 410 U.S. 113 (1973); *In re T. W.*, 551 So. 2d 1186, 1193 (Fla. 1989). The State also has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens. 626 So. 2d, at 672. In addition, the court believed that the State's strong interest in residential privacy, acknowledged in *Frisby v. Schultz*, 487 U.S. 474 (1988), applied by analogy to medical privacy. 626 So. 2d, at 672. The court observed that while targeted picketing of the home threatens the psychological well-being of the "captive" resident, targeted picketing of a hospital or clinic threatens not only the psychological, but the physical well-being of the patient held "captive" by medical circumstance. *Id.*, at 673. We agree with the Supreme Court of Florida that the combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction to protect them. We now examine each contested provision of the injunction to see if it burdens more speech than necessary to accomplish its goal.[5]

A

1

We begin with the 36-foot buffer zone. The state court

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[5] Petitioners do not challenge the first two provisions of the state court's 1993 order. Brief for Petitioners 9. The provisions composed what had been the state court's 1992 permanent injunction and they chiefly addressed blocking, impeding, and inhibiting access to the clinic and its parking lot. Nor do petitioners challenge the restrictions in paragraphs 7, 8, and 9, which prohibit them from harassing and physically abusing clinic doctors, staff, and patients trying to gain access to the clinic or their homes.

prohibited petitioners from "congregating, picketing, patrolling, demonstrating or entering" any portion of the public right-of-way or private property within 36 feet of the property line of the clinic as a way of ensuring access to the clinic. This speech-free buffer zone requires that petitioners move to the other side of Dixie Way and away from the driveway of the clinic, where the state court found that they repeatedly had interfered with the free access of patients and staff. App to Pet. for Cert. B-2, B-3. See *Cameron v. Johnson*, 390 U.S. 611 (1968) (upholding statute which prohibited picketing that obstructed or unreasonably interfered with ingress or egress to or from public buildings, including courthouses, and with traffic on the adjacent street sidewalks). The buffer zone also applies to private property to the north and west of the clinic property. We examine each portion of the buffer zone separately.

We have noted a distinction between the type of focused picketing banned from the buffer zone and the type of generally disseminated communication that cannot be completely banned in public places, such as handbilling and solicitation. See Frisby, supra, at 486 ("The type of focused picketing prohibited by [the state court injunction] is fundamentally different from more generally directed means of communication that may not be completely banned in [public places]"). Here the picketing is directed primarily at patients and staff of the clinic.

The 36-foot buffer zone protecting the entrances to the clinic and the parking lot is a means of protecting unfettered ingress to and egress from the clinic, and ensuring that petitioners do not block traffic on Dixie Way. The state court seems to have had few other options to protect access given the narrow confines around the clinic. As the Florida Supreme Court noted, Dixie Way is only 21 feet wide in the area of the

clinic. App. 260, 305. The state court was convinced that allowing the petitioners to remain on the clinic's sidewalk and driveway was not a viable option in view of the failure of the first injunction to protect access. And allowing the petitioners to stand in the middle of Dixie Way would obviously block vehicular traffic.

The need for a complete buffer zone near the clinic entrances and driveway may be debatable, but some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties even under our heightened review. *Milk Wagon Drivers*, 312 U.S., at 294. Moreover, one of petitioners' witnesses during the evidentiary hearing before the state court conceded that the buffer zone was narrow enough to place petitioners at a distance of no greater than 10 to 12 feet from cars approaching and leaving the clinic. App. 486. Protesters standing across the narrow street from the clinic can still be seen and heard from the clinic parking lots. *Id.*, at 260, 305. We also bear in mind the fact that the state court originally issued a much narrower injunction, providing no buffer zone, and that this order did not succeed in protecting access to the clinic. The failure of the first order to accomplish its purpose may be taken into consideration in evaluating the constitutionality of the broader order. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 697-698 (1978). On balance, we hold that the 36-foot buffer zone around the clinic entrances and driveway burdens no more speech than necessary to accomplish the governmental interest at stake.

JUSTICE SCALIA's dissent argues that a videotape made of demonstrations at the clinic represents "what one must presume to be the worst of the activity justifying the injunction." Post, at 2. This seems to us a gratuitous

assumption. The videotape was indeed introduced by respondents, presumably because they thought it supported their request for the second injunction. But witnesses also testified as to relevant facts in a 3-day evidentiary hearing, and the state court was therefore not limited to JUSTICE SCALIA'S rendition of what he saw on the videotape to make its findings in support of the second injunction. Indeed, petitioners themselves studiously refrained from challenging the factual basis for the injunction both in the state courts and here. Before the Florida Supreme Court, petitioners stated that "the Amended Permanent Injunction contains fundamental error on its face. The sole question presented by this appeal is a question of law, and for purposes of this appeal [petitioners] are assuming, arguendo, that a factual basis exists to grant injunctive relief." Appellants' Motion in Response to Appellees' Motion to Require Full Transcript and Record of Proceedings in No. 93-0069 (Dist. Ct. App. Fla.), p. 2. Petitioners argued against including the factual record as an appendix in the Florida Supreme Court, and never certified a full record. We must therefore judge this case on the assumption that the evidence and testimony presented to the state court supported its findings that the presence of protesters standing, marching, and demonstrating near the clinic's entrance interfered with ingress to and egress from the clinic despite the issuance of the earlier injunction.

2

The inclusion of private property on the back and side of the clinic in the 36-foot buffer zone raises different concerns. The accepted purpose of the buffer zone is to protect access to the clinic and to facilitate the orderly flow of traffic on Dixie Way. Patients and staff wishing to reach the clinic do not have to cross the private property abutting the clinic property on the north and west, and nothing in the record indicates that

petitioners' activities on the private property have obstructed access to the clinic. Nor was evidence presented that protestors located on the private property blocked vehicular traffic on Dixie Way. Absent evidence that petitioners standing on the private property have obstructed access to the clinic, blocked vehicular traffic, or otherwise unlawfully interfered with the clinic's operation, this portion of the buffer zone fails to serve the significant government interests relied on by the Florida Supreme Court. We hold that on the record before us the 36-foot buffer zone as applied to the private property to the north and west of the clinic burdens more speech than necessary to protect access to the clinic.

B

In response to high noise levels outside the clinic, the state court restrained the petitioners from "singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the clinic" during the hours of 7:30 a.m. through noon on Mondays through Saturdays. We must, of course, take account of the place to which the regulations apply in determining whether these restrictions burden more speech than necessary. We have upheld similar noise restrictions in the past, and as we noted in upholding a local noise ordinance around public schools, "the nature of a place, 'the pattern of its normal activities, dictate the kinds of regulations . . . that are reasonable.'" *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). Noise control is particularly important around hospitals and medical facilities during surgery and recovery periods, and in evaluating another injunction involving a medical facility, we stated:

"'Hospitals, after all are not factories or mines or assembly

plants. They are hospitals, where human ailments are treated, where patients and relatives alike often are under emotional strain and worry, where pleasing and comforting patients are principal facets of the day's activity, and where the patient and his family . . . need a restful, uncluttered, relaxing, and helpful atmosphere.'" *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773, 783-784, n. 12
(1979), quoting *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 509 (1978) (BLACKMUN, J., concurring in judgment).

We hold that the limited noise restrictions imposed by the state court order burden no more speech than necessary to ensure the health and well-being of the patients at the clinic. The First Amendment does not demand that patients at a medical facility undertake Herculean efforts to escape the cacophony of political protests. "If overamplified loudspeakers assault the citizenry, government may turn then down." Grayned, supra, at 116. That is what the state court did here, and we hold that its action was proper.

C

The same, however, cannot be said for the "images observable" provision of the state court's order. Clearly, threats to patients or their families, however communicated, are proscribable under the First Amendment. But rather than prohibiting the display of signs that could be interpreted as threats or veiled threats, the state court issued a blanket ban on all "images observable." This broad prohibition on all "images observable" burdens more speech than necessary to achieve the purpose of limiting threats to clinic patients or their families. Similarly, if the blanket ban on "images observable" was intended to reduce the level of anxiety and hypertension suffered by the patients inside the clinic, it would still fail. The only plausible reason a patient would be

bothered by "images observable" inside the clinic would be if the patient found the expression contained in such images disagreeable. But it is much easier for the clinic to pull its curtains than for a patient to stop up her ears, and no more is required to avoid seeing placards through the windows of the clinic. This provision of the injunction violates the First Amendment.

D

The state court ordered that petitioners refrain from physically approaching any person seeking services of the clinic "unless such person indicates a desire to communicate" in an area within 300 feet of the clinic. The state court was attempting to prevent clinic patients and staff from being "stalked" or "shadowed" by the petitioners as they approached the clinic. See *International Society for Krishna Consciousness v. Lee*, 505 U.S. ___, ___, 112 S.Ct. 2701, 2708, 120 L.Ed.2d 541 (1992) ("face-to-face solicitation presents risks of duress that are an appropriate target of regulation. The skillful, and unprincipled, solicitor can target the most vulnerable, including those accompanying children or those suffering physical impairment and who cannot easily avoid the solicitation").

But it is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. Absent evidence that the protesters' speech is independently proscribable (i.e., "fighting words" or threats), or is so infused with violence as to be indistinguishable from a threat of physical harm, see *Milk Wagon Drivers*, 312 U.S., at 292-293, this provision cannot stand. "As a general matter, we have indicated that in public

debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S., at 322 (internal quotation marks omitted). The "consent" requirement alone invalidates this provision; it burdens more speech than is necessary to prevent intimidation and to ensure access to the clinic.[6]

E

The final substantive regulation challenged by petitioners relates to a prohibition against picketing, demonstrating, or using sound amplification equipment within 300 feet of the residences of clinic staff. The prohibition also covers impeding access to streets that provide the sole access to streets on which those residences are located. The same analysis applies to the use of sound amplification equipment here as that discussed above: the government may simply demand that petitioners turn down the volume if the protests overwhelm the neighborhood. *Grayned, supra*, at 116.

As for the picketing, our prior decision upholding a law banning targeted residential picketing remarked on the unique nature of the home, as "'the last citadel of the tired, the weary, and the sick.'" *Frisby*, 487 U.S., at 484. We stated that "'the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society.'" *Ibid.*

But the 300-foot zone around the residences in this case is much larger than the zone provided for in the ordinance which we approved in *Frisby*. The ordinance at issue there made it

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[6] We need not decide whether the "images observable" and "no-approach" provisions are content based.

"unlawful for any person to engage in picketing before or about the residence or dwelling of any individual." *Id.*, at 477. The prohibition was limited to "focused picketing taking place solely in front of a particular residence." *Id.*, at 483. By contrast, the 300-foot zone would ban "general marching through residential neighborhoods, or even walking a route in front of an entire block of houses." *Ibid.* The record before us does not contain sufficient justification for this broad a ban on picketing; it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result.

IV

Petitioners also challenge the state court's order as being vague and overbroad. They object to the portion of the injunction making it applicable to those acting "in concert" with the named parties. But petitioners themselves are named parties in the order, and they therefore lack standing to challenge a portion of the order applying to persons who are not parties. Nor is that phrase subject, at the behest of petitioners, to a challenge for "overbreadth"; the phrase itself does not prohibit any conduct, but is simply directed at unnamed parties who might later be found to be acting "in concert" with the named parties. As such, the case is governed by our holding in *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 14 (1945). There a party subject to an injunction argued that the order was invalid because of a provision that it applied to "successors and assigns" of the enjoined party. Noting that the party pressing the claim was not a successor or assign, we characterized the matter as "an abstract controversy over the use of these words." *Id.*, at 15.

Petitioners also contend that the "in concert" provision of the injunction impermissibly limits their freedom of

association guaranteed by the First Amendment. See, e.g., *Citizens Against Rent Control/Coalition For Fair Housing v. Berkeley*, 454 U.S. 290 (1981). But petitioners are not enjoined from associating with others or from joining with them to express a particular viewpoint. The freedom of association protected by the First Amendment does not extend to joining with others for the purpose of depriving third parties of their lawful rights.

V

In sum, we uphold the noise restrictions and the 36-foot buffer zone around the clinic entrances and driveway because they burden no more speech than necessary to eliminate the unlawful conduct targeted by the state court's injunction. We strike down as unconstitutional the 36-foot buffer zone as applied to the private property to the north and west of the clinic, the "images observable" provision, the 300-foot no-approach zone around the clinic, and the 300-foot buffer zone around the residences, because these provisions sweep more broadly than necessary to accomplish the permissible goals of the injunction. Accordingly, the judgment of the Florida Supreme Court is

Affirmed in part, and reversed in part.

CONCUR BY: SOUTER; STEVENS (In Part); SCALIA (In Part)

CONCUR: JUSTICE SOUTER, concurring.

I join the Court's opinion and write separately only to clarify two matters in the record. First, the trial judge made reasonably clear that the issue of who was acting "in concert" with the named defendants was a matter to be taken up in

individual cases, and not to be decided on the basis of protesters' viewpoints. See Tr. 40, 43, 93, 115, 119-120 (Apr. 12, 1993, Hearing). Second, petitioners themselves acknowledge that the governmental interests in protection of public safety and order, of the free flow of traffic, and of property rights are reflected in Florida law. See Brief for Petitioners 17, and n. 7 (citing, e.g., Fla. Stat. @@ 870.041-870.047 (1991) (public peace); Fla. Stat. @ 316.2045 (1991) (obstruction of public streets, highways, and roads)).

DISSENT BY: STEVENS (In Part); SCALIA (In Part)

DISSENT: JUSTICE STEVENS, concurring in part and dissenting in part.

The certiorari petition presented three questions, corresponding to petitioners' three major challenges to the trial court's injunction.[1] The Court correctly and unequivocally rejects petitioners' argument that the injunction is a "content-based restriction on free speech," ante, at 6-8, as

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[1] "QUESTIONS PRESENTED FOR REVIEW

"1. Whether a state court injunction placing a thirty-six-foot buffer zone around an abortion clinic which prohibits peaceful pro-life speech in a traditional public forum is an unconstitutional content-based restriction on free speech and association.

"2. Whether a state court injunction creating a consent requirement before speech is permitted within a three-hundred-foot buffer zone around an abortion clinic and residential areas is a reasonable time, place, and manner restriction or an unconstitutional prior restraint on free speech.

"3. Whether a state court injunction prohibiting named demonstrators and those acting 'in concert' from expressing peaceful speech within several designated buffer zones violates the First Amendment's protection of freedom of speech and association." Pet. for Cert. i.

well as their challenge to the injunction on the basis that it applies to persons acting "in concert" with them. Ante, at 20-21. I therefore join Parts II and IV of the Court's opinion, which properly dispose of the first and third questions presented. I part company with the Court, however, on its treatment of the second question presented, including its enunciation of the applicable standard of review.

I

I agree with the Court that a different standard governs First Amendment challenges to generally applicable legislation than the standard that measures such challenges to judicial remedies for proven wrongdoing. See ante, at 8-9. Unlike the Court, however, I believe that injunctive relief should be judged by a more lenient standard than legislation. As the Court notes, legislation is imposed on an entire community, *ibid.*, regardless of individual culpability. By contrast, injunctions apply solely to an individual or a limited group of individuals who, by engaging in illegal conduct, have been judicially deprived of some liberty--the normal consequence of illegal activity.[2] Given this distinction, a statute prohibiting demonstrations within 36 feet of an abortion clinic would probably violate the First Amendment, but an injunction directed at a limited group of persons who have engaged in unlawful conduct in a similar zone might well be constitutional.

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[2] Contrary to JUSTICE SCALIA's assumption, see post, at 11, n. 1, the deprivation of liberty caused by an injunction is not a form of punishment. Moreover, there is nothing unusual about injunctive relief that includes some restriction on speech as a remedy for prior misconduct. *National Society of Professional Engineers v. United States*, 435 U. S. 679, 697-698 (1978).

The standard governing injunctions has two obvious dimensions. On the one hand, the injunction should be no more burdensome than necessary to provide complete relief, *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). In a First Amendment context, as in any other, the propriety of the remedy depends almost entirely on the character of the violation and the likelihood of its recurrence. For this reason, standards fashioned to determine the constitutionality of statutes should not be used to evaluate injunctions.

On the other hand, even when an injunction impinges on constitutional rights, more than "a simple proscription against the precise conduct previously pursued" may be required; the remedy must include appropriate restraints on "future activities both to avoid a recurrence of the violation and to eliminate its consequences." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 697-698 (1978). Moreover, "the judicial remedy for a proven violation of law will often include commands that the law does not impose on the community at large." *Teachers v. Hudson*, 475 U.S. 292, 309-310, n. 22 (1986). As such, repeated violations may justify sanctions that might be invalid if applied to a first offender or if enacted by the legislature. See *United States v. Paradise*, 480 U.S. 149 (1987).

In this case, the trial judge heard three days of testimony and found that petitioners not only had engaged in tortious conduct, but also had repeatedly violated an earlier injunction. The injunction is thus twice removed from a legislative proscription applicable to the general public and should be judged by a standard that gives appropriate deference to the judge's unique familiarity with the facts.

II

The second question presented by the certiorari petition asks whether the "consent requirement before speech is permitted" within a 300-foot buffer zone around the clinic unconstitutionally infringes on free speech.[3] Petitioners contend that these restrictions create a "no speech" zone in which they cannot speak unless the listener indicates a positive interest in their speech. And, in Part III-D of its opinion, the Court seems to suggest that, even in a more narrowly defined zone, such a consent requirement is constitutionally impermissible. Ante, at 18-19. Petitioners' argument and the Court's conclusion, however, are based on a misreading of P(5) of the injunction.[4]

That paragraph does not purport to prohibit speech; it

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[3] See n. 1, supra. This question also encompasses the separate but related question whether the 300-foot buffer zone in residential areas is a reasonable time, place, and manner restriction, but incorrectly refers to that zone as containing a consent requirement. For the reasons stated in Part III-E of the Court's opinion, which I join, I agree that the findings do not justify such a broad ban on picketing. I also agree with the Court's rejection of petitioners' prior restraint challenge to the 300-foot zones. See ante, at 7-8, n. 2.

[4] The full text of P(5) reads as follows:

"At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the [petitioners]. In the event of such invitation, the [petitioners] may engage in communications consisting of conversation of a non-threatening nature and by the delivery of literature within the three-hundred (300) foot area but in no event within the 36 foot buffer zone. Should any individual decline such communication, otherwise known as 'sidewalk counseling', that person shall have the absolute right to leave or walk away and the [petitioners] shall not accompany such person, encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them." App. 59.

prohibits a species of conduct. Specifically, it prohibits petitioners "from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring" of petitioners. App. 59. The meaning of the term "physically approaching" is explained by the detailed prohibition that applies when the patient refuses to converse with, or accept delivery of literature from, petitioners. Absent such consent, the petitioners "shall not accompany such person, encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them." *Ibid.* As long as petitioners do not physically approach patients in this manner, they remain free not only to communicate with the public but also to offer verbal or written advice on an individual basis to the clinic's patients through their "sidewalk counseling."

Petitioners' "counseling" of the clinic's patients is a form of expression analogous to labor picketing. It is a mixture of conduct and communication. "In the labor context, it is the conduct element rather than the particular idea being expressed that often provides the most persuasive deterrent to third persons about to enter a business establishment." *NLRB v. Retail Store Employees*, 447 U.S. 607, 619 (1980) (STEVENS, J., concurring in part and concurring in result). As with picketing, the principal reason why handbills containing the same message are so much less effective than "counseling" is that "the former depend entirely on the persuasive force of the idea." *Ibid.* Just as it protects picketing, the First Amendment protects the speaker's right to offer "sidewalk counseling" to all passersby. That protection, however, does not encompass attempts to abuse an unreceptive or captive audience, at least under the circumstances of this case. One may register a public protest by placing a vulgar message on his jacket and, in so doing, expose unwilling viewers, *Cohen v. California*, 403 U.S. 15, 21-22 (1971).

Nevertheless, that does not mean that he has an unqualified constitutional right to follow and harass an unwilling listener, especially one on her way to receive medical services. *Cf. Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

The "physically approaching" prohibition entered by the trial court is no broader than the protection necessary to provide relief for the violations it found. The trial judge entered this portion of the injunction only after concluding that the injunction was necessary to protect the clinic's patients and staff from "uninvited contacts, shadowing and stalking" by petitioners. App. 56. The protection is especially appropriate for the clinic patients given that the trial judge found that petitioners' prior conduct caused higher levels of "anxiety and hypertension" in the patients, increasing the risks associated with the procedures that the patients seek.[5] Whatever the proper limits on a court's power to restrict a speaker's ability to physically approach or follow an unwilling listener, surely the First Amendment does not prevent a trial court from imposing such a restriction given the unchallenged findings in this case.

The Florida Supreme Court correctly concluded:

"While the First Amendment confers on each citizen a powerful right to express oneself, it gives the picketer no boon

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[5] Specifically, in his findings of fact, the trial court noted that:

"This physician also testified that he witnessed the demonstrators running along side of and in front of patients' vehicles, pushing pamphlets in car windows to persons who had not indicated any interest in such literature. As a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such proceedings." *Id.*, at 54.

to jeopardize the health, safety, and rights of others. No citizen has a right to insert a foot in the hospital or clinic door and insist on being heard--while purposefully blocking the door to those in genuine need of medical services. No picketer can force speech into the captive ear of the unwilling and disabled." *Operation Rescue v. Womens Health Center, Inc.*, 626 So. 2d 664, 675 (1993).

I thus conclude that, under the circumstances of this case, the prohibition against "physically approaching" in the 300-foot zone around the clinic withstands petitioners' First Amendment challenge. I therefore dissent from Part III-D.

III

Because I have joined Parts I, II, III-E, and IV of the Court's opinion and have dissented as to Part III-D after concluding that the 300-foot zone around the clinic is a reasonable time, place, and manner restriction, no further discussion is necessary. See n. 1, supra. The Court, however, proceeds to address challenges to the injunction that, although arguably raised by petitioners' briefs, are not properly before the Court.

After correctly rejecting the content-based challenge to the 36-foot buffer zone raised by the first question in the certiorari petition, the Court nevertheless decides to modify the portion of that zone that it believes does not protect ingress to the clinic. Petitioners, however, presented only a content-based challenge to the 36-foot zone; they did not present a time, place, and manner challenge. See n. 1, supra. They challenged only the 300-foot zones on this ground. *Ibid.* The scope of the

36-foot zone is thus not properly before us.[6] *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U. S. Phillips Corp.*, 510 U.S. ___ (1993) (per curiam).[7]

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[6] Indeed, it is unclear whether these challenges were presented to the Florida Supreme Court. In their appeal to that Court, petitioners did not even file the transcript of the evidentiary hearings, contending that the "sole question presented by this appeal is a question of law." See Appellants' Motion in Response to Appellees' Motion to Require Full Transcript and Record of Proceedings in No. 93-00969 (Dist. Ct. App. Fla.), p. 2. Because petitioners argued that the entire decree was invalid as a matter of law, without making any contention that particular provisions should be modified, it appears there was no argument in that Court about the size or the shape of the buffer zones.

Even if the question were properly presented here, I fully agree with the Florida Supreme Court's refusal to quibble over a few feet one way or the other when the parties have not directed their arguments at a narrow factual issue of this kind. *Operation Rescue v. Womens Health Center, Inc.*, 626 So. 2d 664, 673 (1993). Moreover, respect for the highest court of the State strongly counsels against this sort of error correction in this Court.

[7] Even assuming that a time, place, and manner challenge to the 36-foot zone is fairly included within the first question presented, petitioners' brief challenges the entire 36-foot zone as overbroad and seeks to have it invalidated in its entirety. Nowhere in their briefs do they argue that the portion of the zone on the north and west sides of the clinic should be struck down in the event the Court upholds the restrictions on the front and east. As such, we do not have the benefit of respondents' arguments why those portions, if considered severally from the other portions of the zone, should be upheld. Moreover, the existence in the record of facts found by the trial court respecting petitioners' conduct--independent of petitioners' obstruction of ingress and egress--that support the entire 36-foot zone makes the Court's micromanagement of the injunction particularly inappropriate. See, e.g., App. 53 ("The clinic has fences on its west and north side, and persons would occasionally place a ladder on the outside of the fence and position themselves at an elevation above the fence and attempt to communicate by shouting at persons (staff and patients) entering the clinic"); *id.*, at 54 ("The doctor was followed as he

The same is true of the noise restrictions and the "images observable" provision of P(4).[8] That paragraph does not refer to the 36-foot or the 300-foot buffer zones, nor does it relate to the constitutionality of the "in concert" provision. As such, although I am inclined to agree with the Court's resolution respecting the noise and images restrictions, I believe the Court should refrain from deciding their constitutionality because they are not challenged by the questions on which certiorari was granted.

IV

For the reasons stated, I concur in Parts I, II, III-E, and IV of the Court's opinion, and respectfully dissent from the remaining portions.

JUSTICE SCALIA, with whom JUSTICE KENNEDY and JUSTICE THOMAS join, concurring in the judgment in part and dissenting in part.

The judgment in today's case has an appearance of moderation and Solomonic wisdom, upholding as it does some portions of the injunction while disallowing others. That

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left the clinic by a person associated with the [petitioners] who communicated his anger to the doctor by pretending to shoot him from the adjoining vehicle"); *id.*, at 54-55 (noting that "a physician similarly employed was killed by an antiabortionist at a clinic in North Florida").

[8] Paragraph (4) provides in full:

"During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic." *Id.*, at 59.

appearance is deceptive. The entire injunction in this case departs so far from the established course of our jurisprudence that in any other context it would have been regarded as a candidate for summary reversal.

But the context here is abortion. A long time ago, in dissent from another abortion-related case, JUSTICE O'CONNOR, joined by then-JUSTICE REHNQUIST, wrote:

"This Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence. Today's decision goes further, and makes it painfully clear that no legal rule or doctrine is safe from ad hoc nullification by this Court when an occasion for its application arises in a case involving state regulation of abortion. The permissible scope of abortion regulation is not the only constitutional issue on which this Court is divided, but--except when it comes to abortion--the Court has generally refused to let such disagreements, however longstanding or deeply felt, prevent it from evenhandedly applying uncontroversial legal doctrines to cases that come before it." *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 814 (1986) (citations omitted).

Today the ad hoc nullification machine claims its latest, greatest, and most surprising victim: the First Amendment.

Because I believe that the judicial creation of a 36-foot zone in which only a particular group, which had broken no law, cannot exercise its rights of speech, assembly, and association, and the judicial enactment of a noise prohibition, applicable to that group and that group alone, are profoundly at odds with our First Amendment precedents and traditions, I dissent.

I

The record of this case contains a videotape, with running caption of time and date, displaying what one must presume to be the worst of the activity justifying the injunction issued by Judge McGregor and partially approved today by this Court. The tape was shot by employees of, or volunteers at, the Aware Woman Clinic on three Saturdays in February and March 1993; the camera location, for the first and third segments, appears to have been an upper floor of the clinic: The tape was edited down (from approximately 6 to 8 hours of footage to 1/2 hour) by Ruth Arick, a management consultant employed by the clinic and by the Feminist Majority Foundation. App. 527, 529, 533.

Anyone seriously interested in what this case was about must view that tape. And anyone doing so who is familiar with run-of-the-mine labor picketing, not to mention some other social protests, will be aghast at what it shows we have today permitted an individual judge to do. I will do my best to describe it.

On Saturday, March 6, 1993, a group of antiabortion protesters is gathered in front of the clinic, arrayed from east (camera-left) to west (camera-right) on the clinic side of Dixie Way, a small, nonartery street. Men, women, and children are also visible across the street, on the south side of Dixie Way; some hold signs and appear to be protesters, others may be just interested onlookers.

On the clinic side of the street, two groups confront each other across the line marking the south border of the clinic property--although they are so close together it is often impossible to tell them apart. On the clinic property (and with their backs to the camera) are a line of clinic and abortion-rights supporters, stretching the length of the property. Opposite them, and on the public right-of-way

between the clinic property and Dixie Way itself, is a group of abortion opponents, some standing in place, others walking a picket line in an elongated oval pattern running the length of the property's south border. Melbourne police officers are visible at various times walking about in front of the clinic, and individuals can be seen crossing Dixie Way at various times.

Clinic supporters are more or less steadily chanting the following slogans: "Our right, our right, our right, to decide"; "Right to life is a lie, you don't care if women die." Then abortion opponents can be heard to sing: "Jesus loves the little children, all the children of the world, red and yellow, black and white, they are precious in His sight, Jesus loves the little children of the world." Clinic supporters respond with: Q: "What do we want?" A: "Choice." Q: "When do we want it?" A: "Now." ("Louder!") And that call and response is repeated. Later in the tape, clinic supporters chant "1-2-3-4, we won't take it anymore; 5-6-7-8, Separate the Church and State." On placards held by picketers and by stationary protestors on both sides of the line, the following slogans are visible: "Abortionists lie to women." "Choose Life: Abortion Kills." "N.O.W. Violence." "The God of Israel is Pro-life." "RU 486 Now." "She Is a Child, Not a Choice." "Abortion Kills Children." "Keep Abortion Legal." "Abortion: God Calls It Murder." Some abortion opponents wear T-shirts bearing the phrase "Choose Life."

As the abortion opponents walk the picket line, they traverse portions of the public right-of-way that are crossed by paved driveways, on each side of the clinic, connecting the clinic's parking lot to the street. At one point an automobile moves west on Dixie Way and slows to turn into the westernmost driveway. There is a 3-to-4-second delay as the picketers, and then the clinic supporters, part to allow the car

to enter. The camera cuts to a shot of another, parked car with a potato jammed onto the tailpipe. There is no footage of any person putting the potato on to the tailpipe.

Later, at a point when the crowd appears to be larger and the picketers more numerous, a red car is delayed approximately 10 seconds as the picketers (and clinic supporters) move out of the driveway. Police are visible helping to clear a path for the vehicle to enter. As the car waits, two persons appearing to bear leaflets approach, respectively, the driver and front passenger doors. They appear to elicit no response from the car's occupants and the car passes safely onto clinic property. Later, a blue minivan enters the driveway and is also subject to the same delay. Still later a jeep-type vehicle leaves the clinic property and slows down slightly where the driveway crosses the public right-of-way. At no time is there any apparent effort to prevent entry or exit, or even to delay it, except for the time needed for the picketers to get out of the way. There is no sitting down, packing en masse, linking of hands or any other effort to blockade the clinic property.

The persons standing but not walking the picket line include a woman with a child in a stroller, and a man shouting the Book of Daniel's account of Meshach, Shadrach, and Abednego. A woman on a stepladder holds up a sign in the direction of the clinic; a clinic supporter counters with a larger sign held up between the other and the clinic. A brief shot reveals an older man in a baseball cap--head, shoulders, and chest visible above the clinic fence--who appears to be reading silently from a small book. A man on clinic property holds a boom box out in the direction of the abortion opponents. As the crowd grows it appears at various points to have spilled over into the north-side, westbound lane of Dixie Way.

At one point, Randall Terry arrives and the press converge upon him, apparently in Dixie Way itself. A sign is held near his head reading "Randall Terry Sucks." Terry appears to be speaking to the press and at one point tears pages from a notebook of some kind. Through all of this, abortion opponents and abortion-rights supporters appear to be inches from one another on each side of the south border of the property. They exchange words, but at no time is there any violence or even any discernible jostling or physical contact between these political opponents.

The scene shifts to early afternoon of the same day. Most of the press and most of the abortion opponents appear to have departed. The camera focuses on a woman who faces the clinic and, hands cupped over her mouth, shouts the following: "Be not deceived; God is not mocked. . . . Ed Windle, God's judgment is on you, and if you don't repent, He will strike you dead. The baby's blood flowed over your hands, Ed Windle. . . . You will burn in hell, Ed Windle, if you don't repent. There were arms and legs pulled off today. . . . An innocent little child, a little boy, a little girl, is being destroyed right now." Cheering is audible from the clinic grounds. A second person shouts "You are responsible for the deaths of children. . . . You are a murderer. Shame on you." From the clinic grounds someone shouts "Why don't you go join the wacko in Waco?" The first woman says "You are applauding the death of your children. We will be everywhere. . . . There will be no peace and no rest for the wicked. . . . I pray that you will give them dreams and nightmares, God."

The second segment of the videotape displays a group of approximately 40 to 50 persons walking along the side of a major highway. It is Saturday, March 13, 1993, at 9:56 a.m. The demonstrators walk in an oval pattern, carrying no signs

or other visible indicators of their purpose. According to Ruth Arick, this second portion was filmed in front of the condominium where clinic owner Ed Windle lived.

A third segment begins. The date-time register indicates that it is the morning of Saturday, February 20, 1993. A teenage girl faces the clinic and exclaims: "Please don't let them kill me, Mommy. Help me, Daddy, please." Clinic supporters chant, "We won't go back." A second woman, the one who spoke at greatest length in the first segment calls, "If you [inaudible], help her through it." Off camera, a group sings "Roe, Roe, Roe v. Wade, we will never quit, Freedom of choice is the law of the land, better get used to it." The woman from the first segment appears to address specific persons on clinic property: "Do you ever wonder what your baby would have looked like? Do you wonder how old it would have been? Because I did the same thing . . . ." Then a police officer is visible writing someone a citation. The videotape ends with a shot of an automobile moving eastbound on Dixie Way. As it slows to a stop at the intersection of U. S. 1, two leafletters approach the car and then pull back as it passes on.

The videotape and the rest of the record, including the trial court's findings, show that a great many forms of expression and conduct occurred in the vicinity of the clinic. These include singing, chanting, praying, shouting, the playing of music both from the clinic and from handheld boom boxes, speeches, peaceful picketing, communication of familiar political messages, handbilling, persuasive speech directed at opposing groups on the issue of abortion, efforts to persuade individuals not to have abortions, personal testimony, interviews with the press, and media efforts to report on the protest. What the videotape, the rest of the record, and the trial court's findings do not contain is any suggestion of

violence near the clinic, nor do they establish any attempt to prevent entry or exit.

II

A

Under this Court's jurisprudence, there is no question that this public sidewalk area is a "public forum," where citizens generally have a First Amendment right to speak. *United States v. Grace*, 461 U.S. 171, 177 (1983). The parties to this case invited the Court to employ one or the other of the two well established standards applied to restrictions upon this First Amendment right. Petitioners claimed the benefit of so-called "strict scrutiny," the standard applied to content-based restrictions: the restriction must be "necessary to serve a compelling state interest and . . . narrowly drawn to achieve that end." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). Respondents, on the other hand, contended for what has come to be known as "intermediate scrutiny" (midway between the "strict scrutiny" demanded for content-based regulation of speech, and the "rational basis" standard that is applied--under the Equal Protection Clause--to government regulation of non-speech activities). See, e.g., *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. ___, ___ (1994) (slip op., at 17). That standard, applicable to so-called "time, place and manner regulations" of speech, provides that the regulations are permissible so long as they "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Perry, supra, at 45. The Court adopts neither of these, but creates, brand-new for this abortion-related case, an additional standard that is (supposedly) "somewhat more stringent," ante, at 9, than intermediate scrutiny, yet not as "rigorous," ante,

at 10, as strict scrutiny. The Court does not give this new standard a name, but perhaps we could call it intermediate-intermediate scrutiny. The difference between it and intermediate scrutiny (which the Court acknowledges is inappropriate for injunctive restrictions on speech) is frankly too subtle for me to describe, so I must simply recite it: whereas intermediate scrutiny requires that the restriction be "narrowly tailored to serve a significant government interest," the new standard requires that the restriction "burden no more speech than necessary to serve a significant government interest." *Ibid.*

I shall discuss the Court's mode of applying this supposedly new standard presently, but first I must remark upon the peculiar manner in which the standard was devised. The Court begins, in Part II of the opinion, by considering petitioners' contention that, since the restriction is content based, strict scrutiny should govern. It rejects the premise, and hence rejects the conclusion. It then proceeds, in Part III, to examination of respondents' contention that plain old intermediate scrutiny should apply. It says no to that, too, because of the distinctive characteristics of injunctions that it discusses, ante, at 8-9, and hence decides to supplement intermediate scrutiny with intermediate-intermediate scrutiny. But this neatly staged progression overlooks an obvious option. The real question in this case is not whether intermediate scrutiny, which the Court assumes to be some kind of default standard, should be supplemented because of the distinctive characteristics of injunctions; but rather whether those distinctive characteristics are not, for reasons of both policy and precedent, fully as good a reason as "content-basis" for demanding strict scrutiny. That possibility is simply not considered. Instead, the Court begins Part III with the following optical illusion: "If this were a content-neutral, generally applicable statute, instead of an injunctive order, its

constitutionality would be assessed under the [intermediate scrutiny] standard," ante, at 8--and then proceeds to discuss whether petitioners can sustain the burden of departing from that presumed disposition.

But this is not a statute, and it is an injunctive order. The Court might just as logically (or illogically) have begun Part III "If this were a content-based injunction, rather than a non-content-based injunction, its constitutionality would be assessed under the strict scrutiny standard"--and have then proceeded to discuss whether respondents can sustain the burden of departing from that presumed disposition. The question should be approached, it seems to me, without any such artificial loading of the dice. And the central element of the answer is that a restriction upon speech imposed by injunction (whether nominally content based or nominally content neutral) is at least as deserving of strict scrutiny as a statutory, content-based restriction.

That is so for several reasons: The danger of content-based statutory restrictions upon speech is that they may be designed and used precisely to suppress the ideas in question rather than to achieve any other proper governmental aim. But that same danger exists with injunctions. Although a speech-restricting injunction may not attack content as content (in the present case, as I shall discuss, even that is not true), it lends itself just as readily to the targeted suppression of particular ideas. When a judge, on the motion of an employer, enjoins picketing at the site of a labor dispute, he enjoins (and he knows he is enjoining) the expression of pro-union views. Such targeting of one or the other side of an ideological dispute cannot readily be achieved in speech-restricting general legislation except by making content the basis of the restriction; it is achieved in speech-restricting injunctions almost invariably. The proceedings before us here illustrate

well enough what I mean. The injunction was sought against a single-issue advocacy group by persons and organizations with a business or social interest in suppressing that group's point of view.

The second reason speech-restricting injunctions are at least as deserving of strict scrutiny is obvious enough: they are the product of individual judges rather than of legislatures--and often of judges who have been chagrined by prior disobedience of their orders. The right to free speech should not lightly be placed within the control of a single man or woman. And the third reason is that the injunction is a much more powerful weapon than a statute, and so should be subjected to greater safeguards. Normally, when injunctions are enforced through contempt proceedings, only the defense of factual innocence is available. The collateral bar rule of *Walker v. Birmingham*, 388 U.S. 307 (1967), eliminates the defense that the injunction itself was unconstitutional. Accord, *Dade County Classroom Teachers' Assn. v. Rubin*, 238 So. 2d 284, 288 (Fla. 1970). Thus, persons subject to a speech-restricting injunction who have not the money or not the time to lodge an immediate appeal face a Hobson's choice: they must remain silent, since if they speak their First Amendment rights are no defense in subsequent contempt proceedings. This is good reason to require the strictest standard for issuance of such orders.[1]

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[1] JUSTICE STEVENS believes that speech-restricting injunctions "should be judged by a more lenient standard than legislation" because "injunctions apply solely to [those] who, by engaging in illegal conduct, have been judicially deprived of some liberty." Ante, at 2. Punishing unlawful action by judicial abridgment of First Amendment rights is an interesting concept; perhaps Eighth Amendment rights could be next. I know of no authority for the proposition that restriction of speech, rather than fines or imprisonment, should be the sanction for misconduct. The supposed prior violation of a judicial order was the only thing that rendered

The Court seeks to minimize the similarity between speech-restricting injunctions and content-based statutory proscriptions by observing that the fact that "petitioners all share the same viewpoint regarding abortion does not in itself demonstrate that some invidious content- or viewpoint-based purpose motivated the issuance of the order," but rather "suggests only that those in the group whose conduct violated the court's order happen to share the same opinion regarding abortions," ante, at 7. But the Court errs in thinking that the vice of content-based statutes is that they necessarily have the invidious purpose of suppressing particular ideas. "Our cases have consistently held that 'illicit legislative intent is not the sine qua non of a violation of the First Amendment.'" *Simon & Schuster v. New York Crime Victims Bd.*, 502 U.S. ___, ___ (1991) (slip op., at 10) (*quoting Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983)). The vice of content-based legislation--what renders it deserving of the high standard of strict scrutiny--is not that it is always used for invidious, thought-control purposes, but that it lends itself to use for those purposes. And, because of the unavoidable "targeting" discussed above, precisely the same is true of the speech-restricting injunction.

Finally, though I believe speech-restricting injunctions are dangerous enough to warrant strict scrutiny even when they are not technically content based, I think the injunction in the present case was content based (indeed, viewpoint based) to boot. The Court claims that it was directed, not at those who spoke certain things (anti-abortion sentiments), but at those

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petitioners subject to a personally tailored restriction on speech in the first place--not in order to punish them, but to protect the public order. To say that their prior violation not only subjects them to being singled out in this fashion, but also loosens the standards for protecting the public order through speech restrictions, is double counting.

who did certain things (violated the earlier injunction). If that were true, then the injunction's residual coverage of "all persons acting in concert or participation with [the named individuals and organizations], or on their be-half" would not include those who merely entertained the same beliefs and wished to express the same views as the named defendants. But the construction given to the injunction by the issuing judge, which is entitled to great weight, *cf. Forsyth County v. Nationalist Movement*, 505 U.S. ___, ___ (1992) (slip op., at 8); *NLRB v. Donnelly Garment Co.*, 330 U.S. 219, 227 (1947), is to the contrary: all those who wish to express the same views as the named defendants are deemed to be "acting in concert or participation." Following issuance of the amended injunction, a number of persons were arrested for walking within the 36-foot speech-free zone. At an April 12, 1993, hearing before the trial judge who issued the injunction, the following exchanges occurred:

Mr. Lacy: "I was wondering how we can--why we were arrested and confined as being in concert with these people that we don't know, when other people weren't, that were in that same buffer zone, and it was kind of selective as to who was picked and who was arrested and who was obtained for the same buffer zone in the same public injunction."

The Court: "Mr. Lacy, I understand that those on the other side of the issue [abortion-rights supporters] were also in the area. If you are referring to them, the Injunction did not pertain to those on the other side of the issue, because the word in concert with means in concert with those who had taken a certain position in respect to the clinic, adverse to the clinic. If you are saying that is the selective basis that the pro-choice were not arrested when pro-life was arrested, that's the basis of the selection. . . ." Tr. 104-105 (Apr. 12, 1993, Appearance Hearings Held Before Judge McGregor,

Eighteenth Judicial Circuit, Seminole County, Florida (emphasis added)).

And:

John Doe No. 16: "This was the first time that I was in this area myself and I had not attempted to block an entrance to a clinic in that town or anywhere else in the State of Florida in the last year or ever.

"I also understand that the reason why I was arrested was because I acted in concert with those who were demonstrating pro-life. I guess the question that I'm asking is were the beliefs in ideologies of the people that were present, were those taken into consideration when we were arrested?

. . . . .

". . . When you issued the Injunction did you determine that it would only apply to--that it would apply only to people that were demonstrating that were pro-life?"

The Court: "In effect, yes." *Id.*, at 113-116 (emphasis added).

And finally:

John Doe No. 31: ". . . How did the police determine that I was acting in concert with some organization that was named on this injunction? I again am a person who haven't seen this injunction. So how did the police determine that I was acting in concert?"

The Court: "They observed your activities and determined in their minds whether or not what you were doing was in concert with the--I gather the pro-life position of the other, of

the named Defendants." *Id.*, at 148 (emphasis added).

These colloquys leave no doubt that the revised injunction here is tailored to restrain persons distinguished, not by proscribable conduct, but by proscribable views.[2]

B

I have discussed, in the prior subsection, the policy reasons for giving speech-restricting injunctions, even content-neutral ones, strict scrutiny. There are reasons of precedent as well, which are essentially ignored by the Court.

To begin with, an injunction against speech is the very prototype of the greatest threat to First Amendment values, the prior restraint. As THE CHIEF JUSTICE wrote for the Court last Term: "The term prior restraint is used 'to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'. . . Permanent injunctions, i.e.,--court orders that actually forbid speech activities--are classic examples of prior restraints." *Alexander v. United States*, 509 U.S. ___, ___ (1993) (slip op., at 5) (quoting M. Nimmer, Nimmer on Freedom of Speech @ 4.03, p. 4-14

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[2] JUSTICE SOUTER seeks to contradict this, saying that "the trial judge made reasonably clear that the issue of who was acting 'in concert' with the named defendants was . . . not to be decided on the basis of protesters' viewpoints. See Tr. 40, 43, 93, 115, 119-120 (Apr. 12, 1993, Hearing)." The only way to respond to this scattershot assertion is to refer the reader to the cited pages, plus one more (page 116) which clarifies what might have been ambiguous on page 115. These pages are reproduced verbatim in the Appendix to this opinion. As the reader will observe, they do not remotely support JUSTICE SOUTER's assertion that the injunction does not distinguish on the basis of viewpoint.

(1984) (emphasis added in Alexander)).[3] See also *id.*, at ___ (slip op., at 14) ("the [prior restraint] doctrine . . . encompasses injunctive systems which threaten or bar future speech based on some past infraction") (KENNEDY, J., dissenting). We have said that a "prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity," *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (quoting *Carroll v. President and Commr's of Princess Anne*, 393 U.S. 175, 181 (1968), and have repeatedly struck down speech-restricting injunctions. See, e.g., *Youngdahl v. Rainfair*, Inc., 355 U.S. 131 (1957); *Keefe, supra*; *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Nebraska Press Assn. v. Stuart*, 427 U.S. 539 (1976); *National Socialist Party of America v. Skokie*, 432 U.S. 43 (1977); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980) (statute authorizing injunctions); *CBS, Inc. v. Davis*, 510 U.S. ___ (1994) (BLACKMUN, J., in chambers) (setting aside state-court preliminary injunction against a scheduled broadcast).

At oral argument neither respondents nor the Solicitor General, appearing as amicus for respondents, could identify a single speech-injunction case applying mere intermediate scrutiny (which differs little if at all from the Court's intermediate-intermediate scrutiny). We have, in our speech-injunction cases, affirmed both requirements that characterize strict scrutiny: compelling public need and surgical precision of restraint. Even when (unlike in the present case) the First Amendment activity is intermixed with

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[3] This statement should be compared with today's opinion, which says, ante, at 8, n. 2, that injunctions are not prior restraints (or at least not the nasty kind) if they only restrain speech in a certain area, or if the basis for their issuance is not content but prior unlawful conduct. This distinction has no antecedent in our cases.

violent conduct, "'precision of regulation' is demanded." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). In *Milk Wagon Drivers v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941), we upheld an injunction prohibiting peaceful picketing, but only because the picketing had been accompanied by 50 instances of window smashing, bombings, stench bombings, destruction of trucks, beatings of drivers, arson, and armed violence. We noted that the "picketing . . . was set in a background of violence," *id.*, at 294, which was "neither episodic nor isolated," *id.*, at 295, and we allowed the ban on picketing "to prevent future coercion," *id.*, at 296, as part of a state court's power "to deal with coercion due to extensive violence." *Id.*, at 299. We expressly distinguished the case from those in which there was no "entanglement with violence." *Id.*, at 297. In *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957), we refused to allow a blanket ban on picketing when, even though there had been scattered violence, it could not be shown that "a pattern of violence was established which would inevitably reappear in the event picketing were later resumed." *Id.*, at 139.

The utter lack of support for the Court's test in our jurisprudence is demonstrated by the two cases the opinion relies upon. For the proposition that a speech restriction is valid when it "burdens no more speech than necessary to accomplish a significant government interest," the Court cites *NAACP v. Claiborne Hardware Co., supra*, and *Carroll v. President and Commissioners of Princess Anne*, 393 U.S., at 184. But as I shall demonstrate in some detail below, Claiborne applied a much more stringent test; and the very text of Carroll contradicts the Court. In the passage cited, Carroll says this: "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by

constitutional mandate and the essential needs of the public order." *Id.*, at 183. That, of course, is strict scrutiny; and it does not remotely resemble the Court's new proposal, for which it is cited as precedential support. "Significant government interests" (referred to in the Court's test) are general, innumerable, and omnipresent--at least one of them will be implicated by any activity set in a public forum. "Essential needs of the public order," on the other hand, are factors of exceptional application. And that an injunction "burden no more than necessary" is not nearly as demanding as the requirement that it be couched in the "narrowest terms that will accomplish [a] pin-pointed objective." That the Court should cite this case as its principal authority is an admission that what it announces rests upon no precedent at all.

III

A

I turn now from the Court's selection of a constitutional test to its actual application of that test to the facts of the present case. Before doing that, however, it will be helpful--in order to demonstrate how far the Court has departed from past practice--to consider how we proceeded in a relatively recent case that did not involve the disfavored class of abortion protesters. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), involved, like this case, protest demonstrations against private citizens mingling political speech with (what I will assume for the time being existed here) significant illegal behavior.[4]

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[4] *Claiborne Hardware* involved both monetary damages and an injunction, but that is of no consequence for purposes of the point I am making here: that we have been careful to insulate all elements of speech not infected with illegality.

Writing for the Court, JUSTICE STEVENS summarized the events giving rise to the Claiborne litigation (*id.*, at 898-906): A local chapter of the NAACP, rebuffed by public officials of Port Gibson and Claiborne County in its request for redress of various forms of racial discrimination, began a boycott of local businesses. During the boycott, a young black man was shot and killed in an encounter with Port Gibson police and "sporadic acts of violence ensued." *Id.*, at 902. The following day, boycott leader Charles Evers told a group that boycott violators would be disciplined by their own people and warned that the Sheriff "could not sleep with boycott violators at night." *Ibid.* He stated at a second gathering that "If we catch any of you going in any of them racist stores, we're gonna break your damn neck." *Ibid.* In connection with the boycott, there were marches and picketing (often by small children). "Store watchers" were posted outside boycotted stores to identify those who traded, and their names were read aloud at meetings of the Claiborne County NAACP and published in a mimeographed paper. The chancellor found that those persons were branded traitors, called demeaning names, and socially ostracized. Some had shots fired at their houses, a brick was thrown through a windshield and a garden damaged. Other evidence showed that persons refusing to observe the boycott were beaten, robbed and publicly humiliated (by spanking).

The merchants brought suit against two groups involved in organizing the boycott and numerous individuals. The trial court found tort violations, violations of a state statute prohibiting secondary boycotts, and state antitrust violations. It issued a broad permanent injunction against the boycotters, enjoining them from stationing "store watchers" at the plaintiffs' business premises; from persuading any person to withhold patronage; from using demeaning and obscene language to or about any person because of his patronage;

from picketing or patrolling the premises of any of the respondents; and from using violence against any person or inflicting damage upon any real or personal property. *Id.*, at 893. The Mississippi Supreme Court upheld the assessment of liability and the injunction, but solely on the tort theory, saying that "'if any of these factors--force, violence, or threats--is present, then the boycott is illegal regardless of whether it is primary, secondary, economical, political, social or other.'" *Id.*, at 895.

The legal analysis of this Court proceeded along the following lines:

"The boycott . . . took many forms. [It] was launched at a meeting of the local branch of the NAACP. [It] was attended by several hundred persons. Its acknowledged purpose was to secure compliance . . . with a lengthy list of demands for racial equality and racial justice. The boycott was supported by speeches and nonviolent picketing. Participants repeatedly encouraged others to join its cause.

"Each of these elements of the boycott is a form of speech or conduct that is ordinarily entitled to protection under the First and Fourteenth Amendments. . . . 'The practice of persons sharing common views banded together to achieve a common end is deeply embedded in the American political process.' We recognize that 'by collective effort individuals can make their views known, when, individually, their voices would be faint or lost.'" *Id.*, at 907-908 (quoting *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981)).

We went on to say that "the right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine

that is not itself protected," 458 U.S., at 908, and held that the nonviolent elements of the protestors' activities were entitled to the protection of the First Amendment, *id.*, at 915.

Because we recognized that the boycott involved elements of protected First Amendment speech and other elements not so protected, we took upon ourselves a highly particularized burden of review, recognizing a "special obligation on this Court to examine critically the basis on which liability was imposed." *Ibid.* "The First Amendment," we noted, "does not protect violence," but when conduct sanctionable by tort liability "occurs in the context of constitutionally protected activity . . . 'precision of regulation' is demanded." *Id.*, at 916 (quoting *NAACP v. Button*, 371 U.S., at 438). Then, criticizing the Mississippi Supreme Court for "broadly asserting--without differentiation--that intimidation, threats, social ostracism, vilification, and traduction were devices used by the defendants to effectuate the boycott," 458 U.S., at 921 (internal quotation marks omitted), we carefully examined the record for factual support of the findings of liability. While affirming that a "judgment tailored to the consequences of [individuals'] unlawful conduct may be sustained," we said that "mere association with [a] group--absent a specific intent to further an unlawful aim embraced by that group--is an insufficient predicate for liability." *Id.*, at 925-926. We said in conclusion that any characterization of a political protest movement as a violent conspiracy "must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity." *Id.*, at 933-934. Because this careful procedure had not been followed by the Mississippi courts, we set aside the entire judgment, including the injunction. *Id.*, at 924, n. 67, 934.

B

I turn now to the Court's performance in the present case. I am content to evaluate it under the lax (intermediate-intermediate scrutiny) standard that the Court has adopted, because even by that distorted light it is inadequate.

The first step under the Court's standard would be, one should think, to identify the "significant government interest" that justifies the portions of the injunction it upheld, namely, the enjoining of speech in the 36-foot zone, and the making (during certain times) of "sounds . . . within earshot of the patients inside the clinic." Ante, at 16. At one point in its opinion, the Court identifies a number of government interests: the "interest in protecting a woman's freedom to seek lawful medical or counseling services," the "interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens," the "interest in . . . medical privacy," and the interest in "the psychological [and] physical well-being of the patient held 'captive' by medical circumstance." Ante, at 12. The Court says, *ibid.*, that "these governmental interests [are] quite sufficient to justify an appropriately tailored injunction to protect them." Unless, however, the Court has destroyed even more First Amendment law than I fear, this last statement must be read in conjunction with the Court's earlier acknowledgment that "under general equity principles, an injunction issues only if there is a showing that the defendant has violated, or imminently will violate, some provision of statutory or common law, and that there is a 'cognizable danger of recurrent violation.'" Ante, at 9, n. 3, quoting *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). It is too much to believe, even of today's opinion, that it approves issuance

of an injunction against speech "to promote the free flow of traffic" even when there has been found no violation, or threatened violation, of a law relating to that interest.

Assuming then that the "significant interests" the Court mentioned must in fact be significant enough to be protected by state law (a concept that includes a prior court order), which law has been, or is about to be, violated, the question arises: what state law is involved here? The only one even mentioned is the original September 30, 1992, injunction,[5] which had been issued (quite rightly, in my judgment) in response to threats by the originally named parties (including petitioners here) that they would "'physically close down abortionmills,'" "block access to clinics," "ignore the law of the State," and "shut down a clinic." Permanent Injunction Findings of Fact PP 2, 5, 7, 8, App. 6-7. That original injunction prohibited petitioners from:

"1) trespassing on, sitting in, blocking, impeding or obstructing ingress into or egress from any facility at which abortions are performed in Brevard and Seminole County Florida;

"2) physically abusing persons entering, leaving, working, or using any services of any facility at which abortions are performed in Brevard and Seminole County, Florida; and

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[5] JUSTICE SOUTER points out that "petitioners themselves acknowledge that the governmental interests in protection of public safety and order, of the free flow of traffic, and of property rights are reflected in Florida law. See Brief for Petitioners 17, and n. 7 (citing [various Florida statutes])." This is true but quite irrelevant. As the preceding sentence of text shows, we are concerned here not with state laws in general, but with state laws that these respondents had been found to have violated. There is no finding of violation of any of these cited Florida statutes.

"3) attempting or directing others to take any of the actions described in Paragraphs 1 and 2 above." *Id.*, at 9.

According to the Court, the state court imposed the later injunction's "restrictions on petitioner[s'] . . . antiabortion message because they repeatedly violated the court's original order." Ante, at 7. Surprisingly, the Court accepts this reason as valid, without asking whether the court's findings of fact support it--whether, that is, the acts of which the petitioners stood convicted were violations of the original injunction.

The Court simply takes this on faith--even though violation of the original injunction is an essential part of the reasoning whereby it approves portions of the amended injunction, even though petitioners denied any violation of the original injunction, even though the utter lack of proper basis for the other challenged portions of the injunction hardly inspires confidence that the lower courts knew what they were doing, and even though close examination of the factual basis for essential conclusions is the usual practice in First Amendment cases, see Claiborne Hardware, 458 U.S., at 915-916, n. 50; *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963); *Fiske v. Kansas*, 274 U.S. 380, 385-386 (1927); see also *Bose Corp. v. Consumers Union of United States*, Inc., 466 U.S. 485, 517 (1984) (REHNQUIST, J., dissenting). Let us proceed, then, to the inquiry the Court neglected. In the Amended Permanent Injunction the trial court found that "despite the injunction of September 30, 1992, there has been interference with ingress to the petitioners' facility . . . . [in] the form of persons on the paved portions of Dixie Way, some standing without any obvious relationship to others; some moving about, again without any obvious relationship to others; some holding signs, some not; some approaching, apparently trying to communicate with the occupants of motor vehicles moving on the paved surface; some marching in a

circular picket line that traversed the entrance driveways to the two parking lots of the petitioners and the short section of the sidewalk joining the two parking lots and then entering the paved portion of the north lane of Dixie Way and returning in the opposite direction. . . . Other persons would be standing, kneeling and sitting on the unpaved shoulders of the public right-of-way. As vehicular traffic approached the area it would, in response to the congestion, slow down. If the destination of such traffic was either of the two parking lots of the petitioners, such traffic slowed even more, sometimes having to momentarily hesitate or stop until persons in the driveway moved out of the way." Amended Permanent Injunction P A.

"As traffic slowed on Dixie Way and began to turn into the clinic's driveway, the vehicle would be approached by persons designated by the respondents as sidewalk counselors attempting to get the attention of the vehicles' occupants to give them anti-abortion literature and to urge them not to use the clinic's services. Such so-called sidewalk counselors were assisted in accomplishing their approach to the vehicle by the hesitation or momentary stopping caused by the time needed for the picket line to open up before the vehicle could enter the parking lot." *Id.*, P E.

"The . . . staff physician testified that on one occasion while he was attempting to enter the parking lot of the clinic, he had to stop his vehicle and remained stopped while respondent, Cadle, and others took their time to get out of the way . . . . This physician also testified that he witnessed the demonstrators running along side in front of patients' vehicles, pushing pamphlets in such windows to persons who had not indicated any interest in such literature. . . ." *Id.*, P I (emphasis added).

On the basis of these findings Judge McGregor concluded that "the actions of the respondents and those in concert with them in the street and driveway approaches to the clinic of the plaintiffs continue to impede and obstruct both staff and patients from entering the clinic. The paved surfaces of the public right-of-way must be kept open for the free flow of traffic." Conclusions P A.[6]

These are the only findings and conclusions of the court that could conceivably be considered to relate to a violation of the original injunction. They all concern behavior by the protestors causing traffic on the street in front of the abortion clinic to slow down, and causing vehicles crossing the pedestrian right-of-way, between the street and the clinic's parking lot, to slow down or even, occasionally, to stop momentarily while pedestrians got out of the way. As far as appears from the court's findings, all of these results were produced, not by anyone intentionally seeking to block oncoming traffic, but as the incidental effect of persons engaged in the activities of walking a picket line and leafletting on public property in front of the clinic. There is no factual finding that petitioners engaged in any intentional or purposeful obstruction.

Now let us compare these activities with the earlier injunction, violation of which is the asserted justification for

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[6] In my subsequent discussion, I shall give the Florida trial court the benefit of the doubt, and assume that the phrase "continue to impede and obstruct" expresses the conclusion that petitioners had violated those provisions of the original injunction which prohibited "impeding or obstructing." It is not entirely clear, however, that the Florida court was in fact asserting a violation of the original injunction. As far as the record shows, it assessed no penalty for any such violation; and "impeding and obstructing" can embrace many different things, not all of which (as I shall discuss presently) come within the meaning of the original injunction.

the speech-free zone. Walking the return leg of the picket line on the paved portion of Dixie Way (instead of on the sidewalk), and congregating on the unpaved portion of that street, may, for all we know, violate some municipal ordinance (though that was not alleged, and the municipal police evidently did not seek to prevent it); but it assuredly did not violate the earlier injunction, which made no mention of such a prohibition. Causing the traffic along Dixie Way to slow down "in response to the congestion" is also irrelevant; the injunction said nothing about slowing down traffic on public rights of way. It prohibited the doing (or urging) of only three things: 1) "physically abusing persons entering, leaving, working or using any services" of the abortion clinic (there is no allegation of that); 2) "trespassing on [or] sitting in" the abortion clinic (there is no allegation of that); and 3) "blocking, impeding or obstructing ingress into or egress from" the abortion clinic.

Only the last of these has any conceivable application here, and it seems to me that it must reasonably be read to refer to intentionally blocking, impeding or obstructing, and not to such temporary obstruction as may be the normal and incidental consequence of other protest activity. That is obvious, first of all, from the context in which the original injunction was issued--as a response to the petitioners' threatened actions of trespass and blockade, i.e., the physical shutting down of the local clinics. Secondly, if that narrow meaning of intentional blockade, impediment or obstruction was not intended, and if it covered everything up to and including the incidental and "momentary" stopping of entering vehicles by persons leafletting and picketing, the original injunction would have failed the axiomatic requirement that its terms be drawn with precision. See, e.g., *Milk Wagon Drivers*, 312 U.S., at 296; 1 D. Dobbs, Law of Remedies @ 2.8(7), p. 219 (2d ed. 1993); 7 J. Moore, J. Lucas, & K.

Sinclair, Moore's Federal Practice P65.11 (2d ed. 1994); cf. Fed. R. Civ. Proc. 65(d) ("every order granting an injunction . . . shall be specific in terms [and] shall describe in reasonable detail . . . the act or acts sought to be restrained"). And finally, if the original injunction did not have that narrow meaning it would assuredly have been unconstitutional, since it would have prevented speech-related activities that were, insofar as this record shows, neither criminally or civilly unlawful nor inextricably intertwined with unlawful conduct. See *Milk Wagon Drivers, supra*, at 292, 297; *Carroll*, 393 U.S., at 183-184.

If the original injunction is read as it must be, there is nothing in the trial court's findings to suggest that it was violated. The Court today speaks of "the failure of the first injunction to protect access." Ante, at 14. But the first injunction did not broadly "protect access." It forbade particular acts that impeded access, to-wit, intentionally "blocking, impeding or obstructing." The trial court's findings identify none of these acts, but only a mild interference with access that is the incidental by-product of leafletting and picketing. There was no sitting down, no linking of arms, no packing en masse in the driveway; the most that can be alleged (and the trial court did not even make this a finding) is that on one occasion protestors "took their time to get out of the way." If that is enough to support this one-man proscription of free speech, the First Amendment is in grave peril.

I almost forgot to address the facts showing prior violation of law (including judicial order) with respect to the other portion of the injunction the Court upholds: the no-noise-within-earshot-of-patients provision. That is perhaps because, amazingly, neither the Florida courts nor this Court makes the slightest attempt to link that provision to prior

violations of law. The relevant portion of the Court's opinion, Part II-B, simply reasons that hospital patients should not have to be bothered with noise, from political protests or anything else (which is certainly true), and that therefore the noise restrictions could be imposed by injunction (which is certainly false). Since such a law is reasonable, in other words, it can be enacted by a single man to bind only a single class of social protesters. The pro-abortion demonstrators who were often making (if respondents' videotape is accurate) more noise than the petitioners, can continue to shout their chants at their opponents exiled across the street to their hearts' content. The Court says that "we have upheld similar noise restrictions in the past," ante, at 16, citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972). But *Grayned* involved an ordinance, and not an injunction; it applied to everyone. The only other authority the Court invokes is *NLRB v. Baptist Hospital, Inc.*, 442 U.S. 773 (1979), which it describes as "evaluating another injunction involving a medical facility," ante, at 17, but which evaluated no such thing. Baptist Hospital, like Grayned, involved a restriction of general application, adopted by the hospital itself--and the case in any event dealt not with whether the government had violated the First Amendment by restricting noise, but with whether the hospital had violated the National Labor Relations Act by restricting solicitation (including solicitation of union membership).

Perhaps there is a local ordinance in Melbourne, Florida, prohibiting loud noise in the vicinity of hospitals and abortion clinics. Or perhaps even a Florida common-law prohibition applies, rendering such noise-making tortious. But the record in this case shows (and, alas, the Court's opinion today demands) neither indication of the existence of any such law nor a finding that it had been violated. The fact that such a law would be reasonable is enough, according to the Court, to

justify a single judge in imposing it upon these protesters alone. The First Amendment (and even the common law of injunctions, see the Court's own footnote 3) reels in disbelief.

The Court does not even attempt a response to the point I have made in this section, insofar as the injunction against noise is concerned. That portion of its opinion, ante, at 16-17, does not even allege any violation of the prior injunction to support this judge-crafted abridgment of speech. With respect to the 36-foot speech-free zone, the Court attempts a response, which displays either a misunderstanding of the point I have made or an effort to recast it into an answerable one. My point does not rely, as the Court's response suggests, ante, at 15, upon my earlier description of the videotape. That was set forth just for context, to show the reader what suppression of normal and peaceful social protest is afoot here. Nor is it relevant to my point that "petitioners themselves studiously refrained from challenging the factual basis for the injunction," *ibid*. I accept the facts as the Florida court found them; I deny that those facts support its conclusion (set forth as such in a separate portion of its opinion, as quoted above) that the original injunction had been violated. The Court concludes its response as follows:

"We must therefore judge this case on the assumption that the evidence and testimony presented to the state court supported its findings that the presence of protesters standing, marching, and demonstrating near the clinic's entrance interfered with ingress to and egress from the clinic despite the issuance of the earlier injunction." Ante, at 15-16.

But a finding that they "interfered with ingress and egress . . . despite the . . . earlier injunction" is not enough. The earlier injunction did not, and could not, prohibit all "interference"--for example, the minor interference

incidentally produced by lawful picketing and leafletting. What the Court needs, and cannot come up with, is a finding that the petitioners interfered in a manner prohibited by the earlier injunction. A conclusion that they "blocked, impeded or obstructed ingress . . . or egress" (the terminology of the original injunction) within the only fair, and indeed the only permissible, meaning of that phrase cannot be supported by the facts found.

To sum up: The interests assertedly protected by the supplementary injunction did not include any interest whose impairment was a violation of Florida law or of a Florida-court injunction. Unless the Court intends today to overturn long-settled jurisprudence, that means that the interests cannot possibly qualify as "significant interests" under the Court's new standard.

C

Finally, I turn to the Court's application of the second part of its test:
whether the provisions of the injunction "burden no more speech than necessary" to serve the significant interest protected.

This test seems to me amply and obviously satisfied with regard to the noise restriction that the Court approves: it is only such noise as would reach the patients in the abortion clinic that is forbidden--and not even at all times, but only during certain fixed hours and "during surgical procedures and recovery periods." (The latter limitation may raise vagueness and notice problems, but that does not concern us here. Moreover, as I have noted earlier, the noise restriction is invalid on other grounds.) With regard to the 36-foot speech-free zone, however, it seems to me just as obvious that

the test which the Court sets for itself has not been met.

Assuming a "significant state interest" of the sort cognizable for injunction purposes (i.e., one protected by a law that has been or is threatened to be violated) in both (1) keeping pedestrians off the paved portion of Dixie Way, and (2) enabling cars to cross the public sidewalk at the clinic's driveways without having to slow down or come to even a "momentary" stop, there are surely a number of ways to protect those interests short of banishing the entire protest demonstration from the 36-foot zone. For starters, the Court could have (for the first time) ordered the demonstrators to stay out of the street (the original injunction did not remotely require that). It could have limited the number of demonstrators permitted on the clinic side of Dixie Way. And it could have forbidden the pickets to walk on the driveways. The Court's only response to these options is that "the state court was convinced that [they would not work] in view of the failure of the first injunction to protect access." Ante, at 14. But must we accept that conclusion as valid--when the original injunction contained no command (or at the very least no clear command) that had been disobeyed, and contained nothing even related to staying out of the street? If the "burden no more speech than necessary" requirement can be avoided by merely opining that (for some reason) no lesser restriction than this one will be obeyed, it is not much of a requirement at all.

But I need not engage in such precise analysis, since the Court itself admits that the requirement is not to be taken seriously. "The need for a complete buffer zone," it says, "may be debatable, but some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties even under our heightened review." *Ibid.* (emphasis added). In application, in other

words, the "burden no more speech than is necessary" test has become an "arguably burden no more speech than is necessary" test. This renders the Court's intermediate-intermediate scrutiny not only no more stringent than plain old intermediate scrutiny, but considerably less stringent.

Another disturbing part of the Court's analysis is its reliance upon the fact that "witnesses . . . conceded that the buffer zone was narrow enough to place petitioners at a distance of no greater than 10 to 12 feet from cars approaching and leaving the clinic," and that "protesters standing across the narrow street from the clinic can still be seen and heard from the clinic parking lots." *Ibid.* This consideration of whether the injunction leaves open effective, alternative channels of communication is classic, time-place-and-manner-regulation, "intermediate scrutiny" review, see *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). And in that context it is reasonable. But since in this case a general regulation establishing time, place, and manner restrictions for all citizens is not at issue, these petitioners have a right, not merely to demonstrate and protest at some reasonably effective place, but to demonstrate and protest where they want to and where all other Floridians can, namely, right there on the public sidewalk in front of the clinic. "One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State (Town of Irvington)*, 308 U.S. 147, 163 (1939). "Whether petitioner might have used some other [forum] . . . is of no consequence. . . . Even if [another] forum had been available, that fact alone would not justify an otherwise impermissible prior restraint." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 556 (1975).

* * *

In his dissent in *Korematsu v. United States*, 323 U.S. 214 (1944), the case in which this Court permitted the wartime military internment of Japanese-Americans, Justice Jackson wrote the following:

"A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion . . . rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Id.*, at 246.

What was true of a misguided military order is true of a misguided trial-court injunction. And the Court has left a powerful loaded weapon lying about today.

What we have decided seems to be, and will be reported by the media as, an abortion case. But it will go down in the lawbooks, it will be cited, as a free-speech injunction case--and the damage its novel principles produce will be considerable. The proposition that injunctions against speech are subject to a standard indistinguishable from (unless perhaps more lenient in its application than) the "intermediate scrutiny" standard we have used for "time, place, and manner" legislative restrictions; the notion that injunctions against speech need not be closely tied to any violation of law, but may simply implement sound social policy; and the practice of accepting trial-court conclusions permitting injunctions without considering whether those conclusions are supported by any findings of fact--these latest by-products of

our abortion jurisprudence ought to give all friends of liberty great concern.

For these reasons, I dissent from that portion of the judgment upholding parts of the injunction.

APPENDIX TO OPINION OF JUSTICE SCALIA

Portions of April 12, 1993, Appearance Hearings Held Before Judge McGregor, Eighteenth Judicial Circuit, Seminole County, Florida:

Page 40:

JANE DOE: No. 6: "Yes, sir. When I heard this injunction, everything in there, as an American--"

THE COURT: "I'm Sorry. I'm not the judge trying it. Those are matters that perhaps you'll want to present at trial."

JANE DOE NO. 6: "I do have a question, too. I'm confused as to why the people who were blockading the clinic who had pro-choice signs were not arrested along with me. They--it appeared to me they were violating the same injunction I was, you know--"

THE COURT: "The Injunction is directed only against certain named Defendants, certain named organizations and those acting in concert with them. Presumably, as you say, the other side would not have been acting in concert with the named Defendants."

JANE DOE NO. 6: "But I was in concert with nobody. I was just an American citizen, defending the right to assemble and to demonstrate."

THE COURT: "Again, perhaps, that would be a matter of defense that you would present at the time of trial."

JANE DOE NO. 6: "So the Injunction only . . . ."

Page 43:

JANE DOE NO. 6: "But I was not in concert with anybody."

THE COURT: "Again, I say that at the time of your trial, perhaps, that would be a defensive matter. Although, I'm told by the Melbourne Police Department that everyone was put on notice that the thirty-six-foot area was a restricted area and when--if you presumably had notice of that and chose to enter, then, you chose to violate the Court's Injunction. That's why you were arrested."

JANE DOE NO. 6: "I don't mean this disrespectfully, but does not the constitutional freedom to be on public sidewalk and to--"

THE COURT: "There is nothing in the constitution that says that anyone is entitled to walk on any sidewalk."

JANE DOE NO. 6: "But I have the right to demonstrate, the right to assembly, the right to religion and its practice and I was praying on the sidewalk. I don't understand--"

THE COURT: "And that will not be denied you, but it is subject to regulation. The Court provided the south shoulder of Dixie Way as an area for that to be done."

Page 93:

MR. QUINTERO: "And who are these Defendants? I have no idea."

THE COURT: "They're set out in the Injunction."

MR. QUINTERO: "Because I'm not working in conjunction with anybody. I don't know anything. I don't belong to any group that is doing absolutely anything like this. I am just a normal Christian that went to pray on the sidewalk."

THE COURT: "Again, those may be defensive matters. I'm saying that you should bring them up first with your lawyer and then at the time of trial."

MR. QUINTERO: "Okay, I would like to formally request to have this injunction so I can look at it while I'm incarcerated and that I can make arrangements to talk to counsel about it."

THE COURT: "Your lawyer knows how to obtain a copy. Copies are available at, again, the branch courthouses in Melbourne and Melbourne City Hall. Copies are available at the Clerk's Office here in Seminole County."

MR. QUINTERO: "At this time I do not have a lawyer and I see it very difficult for me to go to the Melbourne Courthouse being incarcerated."

Page 115-116:

[JOHN DOE NO. 16]: ". . . do with the determination in the Injunctive Order or in the arrest?"

THE COURT: "You know, I wasn't there. I don't know. All I know is that the officer used his perceptions, his eyes,

his ears, took note of the activities that were going on and for reasons, you know, he believed that you were in concert with those that had been enjoined and the Injunctive Order is expanded to include those so that you were subject then to the Injunction."

JOHN DOE NO. 16: "When you issued the Injunctive Court Order did you include what someone might believe about abortion or about their right to assemble there, or let's just say about abortion as a basis for arrest?"

THE COURT: "I considered all of the evidence before me."

JOHN DOE NO. 16: "And would one of those things be, would one of the reasons that I was arrested be because I opposed abortion in that clinic?"

THE COURT: "No."

JOHN DOE NO. 16: "Okay. If I was to stand here, if I was to testify that I did not oppose abortion would that make any difference in my arrest?"

THE COURT: "You can't be unarrested. You have been arrested."

JOHN DOE NO. 16: "What about being charged with violating the Court Order?"

THE COURT: "It will be up to the prosecutor, the State Attorney, to make a charge decision. And sometimes lawyers in representing clients will go to a prosecutor in advance of his charge decision and ask that he, you know, consider additional matters that might cause him to not make such a

charge decision. Those are matters lawyers best know how to do."

JOHN DOE NO. 16: "When you issued the Injunction did you determine that it would only apply to--that it would apply only to people that were demonstrating that were pro-life?"

THE COURT: "In effect, yes."

JOHN DOE NO. 16: "Okay, thank you."

THE COURT: "Any other questions?"

JOHN DOE NO. 16: "No."

THE COURT: "Thank you. Did we give him a court date?

"John Doe Number Eighteen."

JOHN DOE NO. 18: "Were there any numbers . . ."

Pages 119-120:

MR. MACLEAN: "Yes, please, Your Honor."

THE COURT: "Okay. Court will then direct pre-trial release officer to interview and provide the results of the interview to Judge Eaton after 1:00 o'clock today and he will consider that release. Do you wish to be considered for court-appointed counsel?"

MR. MACLEAN: "No thank you."

THE COURT: "Do you have any questions?"

MR. MACLEAN: "Yes, please. Would you extend your gracious offer to reduce the bond for myself also?"

THE COURT: "Surely. Reduce bond to a hundred dollars."

THE CLERK: "Total?"

THE COURT: "Hmm?"

THE CLERK: "Total?"

THE COURT: "No. I can't deal with the--"

THE CLERK: "Eleven hundred?"

THE COURT: "Eleven hundred, yes."

MR. MACLEAN: "Respectfully, sir, where on my arrest report does it allege that I was acting in concert with anyone?"

THE COURT: "It is embodied in the phrase violation of the Injunctive Court Order. But again, this is an arrest report. It is not a formal charge. Presumably within the formal charge there will be that reference, sir."

MR. MACLEAN: "I'm finished with questions, sir, but may I make a statement which I promise you I won't--"

THE COURT: "I can't deal with the statement. In other words, I've got a lot of people to see and the statement may be defensive in nature and it is a matter that should be brought to the trial of the matter."

MR. MACLEAN: "I only wish to thank the Melbourne

Police Department and the Sharpes Correctional facility and the people here in Seminole for their gracious and professional treatment of us."

THE COURT: "Thank you on their behalf."

MR. MACLEAN: "Okay, sir."

THE COURT: "John Doe Number Eighteen. This is out of order now."

THE CLERK: "Yes, sir."

THE COURT: "You've been designated as John Doe Number Eighteen. Do you wish to maintain that designation for these proceedings?"

APPENDIX B

Supreme Court of the United States

No. 93-880

JUDY MADSEN, ET AL.,

Petitioners

v.

WOMEN'S HEALTH CENTER, INC., ET AL.

ON WRIT OF CERTIORARI to the Supreme Court of Florida.

THIS CAUSE came on to be heard on the transcript of the record from the above court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is affirmed in part and reversed in part with costs and the cause is remanded to the Supreme Court of Florida for further proceedings not inconsistent with the opinion of this Court.

IT IS FURTHER ORDERED that the petitioners, Judy

Madsen, et al., recover one-half costs from Women's Health Center, Inc., et al., Eleven Thousand Nine Hundred Seventy Seven Dollars and Fifteen-Cents ($11,977.15) for their costs herein expended.

June 30, 1994

Printing of record:	$23,654.30
Clerk's costs:	300.00
Total:	$23,954.30
One-half costs:	$11,977.15

APPENDIX C

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT IN
AND FOR SEMINOLE COUNTY, FLORIDA.

CASE NO. 91-2811-CA-16-L

WOMEN'S HEALTH CENTER, INC.,
AWARE WOMAN CENTER FOR CHOICE,
INC., et al.,

Petitioners,

vs

OPERATION RESCUE, OPERATION
RESCUE AMERICA, OPERATION
GOLIATH, ED MARTIN, BRUCE CADLE,
et al.,

Respondents.
_____/

MODIFIED AMENDED PERMANENT INJUNCTION

THIS CAUSE came before the court upon remand from the Florida Supreme Court, directing this court to modify its Amended Permanent Injunction entered on April 8, 1993, in accordance with the dictates of *Madsen v. Women's Health Center. Inc,* 512 U.S. - , 114 S. Ct. 2516, 129L. Ed. 2d 593 (1994). Accordingly, the Amended Permanent Injunction is modified as follows:

A. That despite the injunction of September 30, 1992,

there has been interference with ingress to the petitioners' facility known as the Aware Woman CIinic located on the northwest corner of U. S. Highway 1 and Dixie Way in the City of Melbourne, Brevard County, FIorida. The interference to ingress has taken the form of persons on the paved portions of Dixie Way, some standing without any obvious relationship to others; some moving about, again, without any obvious relationship to others; some holding signs, some not; some approaching, apparently trying to communicate with the occupants of motor vehicles moving on the paved surface; some marching in a circular picket line that traversed the entrance driveways to the two parking lots of the petitioners and the short section of sidewalk joining the two parking lots and then entering the paved portion of the north lane of Dixie Way and returning in the opposite direction. (See drawing attached.) Other persons would be standing, kneeling and sitting on the unpaved shoulders of the public right-of-way. As vehicular traffic approached the area it would, in response to the congestion, slow down. Ifthe destination of such traffic was either of the two parking lots of petitioners, such traffic slowed even more, sometimes having to momentarily hesitate or stop until persons in the driveway moved out of the way.

B. The number of people on any one day would vary from a handful to a crowd of four hundred. The composition of the crowd would include some of the named respondents in this cause; some persons who were loosely associated with the respondents' organization, Operation Rescue and Operation Goliath; some who were present in support of theclinic [pro-choice); some law enforcement officers engaging in crowd and traffic control (from five officers on light days to as many as fifty officers on other days]; and some representatives of the print and television media. The frequency with which persons would appear at this location wouldrange from once a week to

three times a week with the largest gatherings usually on Saturdays.

C. Associated with such gatherings would be noise emanating from singing, chanting, whistling, loud speakers on the exterior of the clinic broadcasting music, individual portable radios (boom boxes) and occasional bullhorns. Individuals of the partisan groups would shout and yell at each other, frequently approaching so closely as to be in each other's face trying to out-sound the other, occasionally using boom boxes at full volume as an assist.

D. The Melbourne Police Department officers on the scene on some occasions erected temporary barricades (saw horse type) in an effort to put some distance between the partisan groups. The respondents and those aligned with them remained primarily in the public right of way (paved and unpaved). The pro choice people would be on the edge of the clinic's lawn and parking lot (private property) but occasionally attempting to share the sidewalk with the opposition. On at least one occasion in order to give more room for people, the police barricaded the north lane of Dixie Way so that two-way vehicular traffic was confined to the single south lane.

E. As traffic slowed on Dixie Way and began its turn into the clinic's driveway, the vehicles would be approached by persons designated by the respondents as sidewalk counselors attempting to get attention of the vehicles' occupants to give them anti-abortion literature and to urge them not to use the' clinic's services. Such so-called sidewalk counselors were assisted in accomplishing their approach to the vehicle by the hesitation or momentary stopping caused by the time needed for the picket line to open up before the vehicle could enter the parking lot.

F. The clinic has fences on its west and north side, and persons would occasionally place a ladder on the outside of the fence and position themselves at an elevation above the fence and attempt to communicate by shouting at persons (Staff and patients) entering the clinic. On oneoccasion the communication to a clinic staff person took the form of an attempt to invoke the wrath of God by shouting, "I pray that God strikes you dead now!".

G. On other occasions since the entry of the injunction of September 30, 1992, the respondent, Cadle, and others in concert with him approached the private residences or temporary lodging places of clinic employees. These approaches included not only direct communication with the occupants (sometimes the "home alone" minor children of the occupants), but also carrying signs walking up and down on the sidewalk or street in front of the residence, shouting at passers-by, contacting (ringing doorbells of) neighbors, and providing literature identifying the clinic employee as a "baby killer".

H. On one occasion the respondent, Cadle, with others went to the vicinity of the motel where a staff physician was temporarily staying and demonstrated. While respondent, Cadle, remained outside just off the premises of the motel, others went upon the premises of the motel, some entering the motel lobby, yelling "child murderer" and "Baby killer". The doctor testified that as a result of such activity his departure for the clinic was delayed by one-half hour.

I. The same staff physician testified that on one occasion while he was attempting to enter the parking lot of the clinic, he had to stop his vehicle and remained stopped while respondent, Cadle, and others took their time to get out of the way and while doing so were yelling and screaming at

the doctor, "Baby killer" - "We don't want you here in Melbourne. " This physician also testified that he witnessed the demonstrators running along side of and in front of patients' vehicles, pushing pamphlets in car windows to persons who had not indicated any interest in such literature. As a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures. The doctor also testified that the noise of singing, chanting, shouting and yelling could be heard through thewalls of the clinic and caused stress in the patients during surgical procedures and while recuperating in the recovery rooms. The doctor also testified that he observed some patients turn away from the crowd in the driveway to return at a later date. He testified that such delay in undergoing the procedures also increased the risk associated therewith.

J. On another occasion the doctor was followed as he left the clinic by a person associated with the respondents who communicated his anger to the doctor by pretending to shoot him from the adjoining vehicle. As a result of the foregoing demonstrations and activities, and after a physician similarly employed was killed by an antiabortionist at a clinic in North Florida, this doctor terminated his employment with the clinic.

K. Further the testimony of witnesses shows:

1. That license tag numbers of the clinic's patients are recorded by the respondents or persons in concert with them and then are traced through state records to obtain the home address of such persons who are subsequently contacted by the respondents.

2. That on occasion repeated, nearly simultaneous, multiple telephone calls are made to the clinic, jamming its telephone lines. The jamming of the clinic's telephone system makes it impossible for clinic staff to summon an ambulance to transfer any patient to the hospital should an emergency arise.

3. That patients and staff are sometimes followed in as talking manner when they leave the clinic, giving such persons a feeling of great apprehension.

CONCLUSIONS

A. That the actions of the respondents and those in concert with them in the street and driveway approaches to the clinic of the plaintiffs continue to impede and obstruct both staff and patients from entering the clinic. The paved surfaces of the public right-of-way must be kept open for the free flow of vehicular traffic.

B. That the noise associated with the demonstrations impermissibly interferes with the operation of the clinic and the well-being of its patients and should be limited and restrained.

C. That the actions of the respondents and those acting in concert with them directed at the residences (including the temporary motel residence) of the clinic staff is impermissible conduct and should be limited and restrained. A person's home is his last place of refuge and his right of privacy therein should be protected. A place of business, not involved in the controversy of others, should not be subjected to demonstrations that interfere with business customers.

D. That the actions of the respondents and those acting in concert with them in respect to interfering with the telephone service of the clinic is impermissible and should be restrained.

E. That the shadowing and stalking by the respondents and thoseacting in concert with them of the clinic staff and patients is impermissible conduct and should be restrained.

F. That the actions of respondents and those acting in concert with them in impeding the free ingress and egress to and from the clinic is not permissible and should be restrained.

G. That the rights of the respondents to demonstrate, speak and make known their views should be recognized and protected.

It is, therefore

ORDERED AND ADJUDGED that the respondents, Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen and Shirley Hobbs, and all persons acting in concert or participation with them, or on their behalf, with notice in any manner or by means of this order (hereinafter referred to generally as respondents) are permanently enjoined from engaging in the following:

1. At all times on all days, from entering the premises and property of the Aware Woman Center for Choice Clinic, Inc. (hereinafter Clinic) located at the northwest corner of U.S. Highway 1 and Dixie Way in Melbourne, Brevard County, Florida.

2. At all times on all days, from blocking, impeding, inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic.

3. At all times of all days, from congregating, picketing, patrolling, demonstrating, or entering that portion of public right-of-way or private property within thirty-six (36) feet of the property line of the Clinic. The 36 foot buffer on the south side of the Clinic is demarcated by the south edge of the paved surface of Dixie Way. It is the intent of the court that the respondents may use, subject to other restrictions contained herein, the unpaved portion (the shoulder) on the south side of Dixie Way. A drawing is attached hereto showing the various areas and lines. An exception to the 36 foot buffer zone is the area immediately adjacent to the Clinic on the east, lying in the right-of-way of U.S. Highway 1, This area is composed of a flat shoulder area rising up an embankment to the easterly property line of the Clinic. The respondents may enter the shoulder area of U.S. Highway 1, but may not go up the embankment and must remain at least five (5) feet from the Clinic's east line. Another exception to the 36 foot buffer zone relates to the privately held property to the north and west of the Clinic. The prohibition against entry into the 36 foot buffer zone does not apply to such property. However, this provision of the injunction shall not be construed to preclude the owners of that private property from taking legalaction to exclude respondents from their property, should the owners so desire. Another exception to the 36 foot buffer zone relates to the area of the pedestrian crosswalk near the area where Dixie Way enters into U.S. Highway 1. The testimony before the Court revealed that such crosswalk is not presently marked by customary white lines. It is the request of this court, in order to assist the parties in complying with this injunction, that the

City of Melbourne establish a crosswalk area at the eastern end of Dixie Way in the customary manner by applying painted lines on the surface of the pavement. Until such lines are applied, the respondents may use an area of the paved surface of Dixie Way as a crosswalk, but must confine their use of such area to a strip of pavement eight (8) feet wide, running directly from the south edge of Dixie Way to the north edge thereof, the westerly line of such strip being coextensive with the western right-of-way line of U.S. Highway 1. (See drawing attached.) After painted lines are applied, the respondents must not enter any portion of the paved surface of Dixie Way outside of the crosswalk within the 36 foot buffer zone. The respondents' use of the crosswalk must be limited to the prompt crossing of the street. The crosswalk may not be used as an area of picketing, congregating or demonstrating. The respondents' use of the crosswalk must not inhibit or impede the free flow of traffic on Dixie Way, and no stopping or hesitation in the crosswalk shall be allowed.

4. During the hours of 7:30 a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, using bullhorns, auto horns, sound amplification equipment or other sounds, or images which convey threats, veiled or otherwise, observable to or within earshot of the patients inside the Clinic.

5. Outside of the 36 foot buffer zone, respondents and those acting in concert with them may physically approach persons seeking the services of the clinic to engage in non-threatening communications and to distribute literature. However, at all times and on all days, should any individual decline such communication, otherwise known as "sidewalk counseling", that person shall have the absolute right to leave

or walk away and the respondents shall not encircle, surround, impede the progress of, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them.

6. Respondents and those acting in concert with them may not approach, congregate, picket, patrol, demonstrate, use bullhorns or other sound amplification equipment within three hundred feet of the residences or temporary residences of any of the petitioners' employees, staff, owners or agents (referred here collectively as petitioners) except as follows:

a. Respondents may engage in peaceful marching and picketing on weekdays, excluding national holidays, from 10:00 a.m. to 12:00 p.m. However, such picketing and marching shall be limited to the sidewalk, or if none, the shoulder of the road, across the street from petitioners' residences or temporary residences. Furthermore, such picketing and marching shall not, momentarily or otherwise, impede the absolute free ingress or egress of petitioners or petitioners' neighbors on the roadways providing access to the streets on which petitioners' homes are located, the streets themselves upon which petitioners' residences are located or the driveways of petitioners' or their neighbors' residences.

b. The number of picketers and marchers shall be limited to twenty five at any one time.

c. No communications, either by pickets, audible sound or conduct, which convey threats or veiled threats shall be permitted.

7. At all times on all days, from physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or leaving, working

at or using services at the petitioners' Clinic or trying to gain access to, or leave, any of the homes of owners, staff or patients of the Clinic.

8. At all times on all days, from harassing, intimidating or physically abusing, assaulting or threatening any present or former doctor, health care professional, or other staff member, employee or volunteer who assists in providing services at the petitioners' Clinic.

9. At all times on all days, from encouraging, inciting, or securing other persons to commit any of the prohibited acts listed herein.

ORDERED AND ADJUDGED that nothing herein shall restrict duly constituted law enforcement authorities from providing traffic control and regulation and measures necessary to insure public safety and the protection of both public and private property.

ORDERED AND ADJUDGED that any City of Melbourne police officer or other person authorized to serve process may serve a copy of this order on any individual who may not have otherwise received notice of the order. Such officer may read the operative prohibitory language of this order to any individual who is without notice of this order, and such service or oral notice shall subject the person so served or noticed to the sanctions provided for herein for failure to comply herewith. If the authorities of the City of Melbourne determine that it would assist them in enforcing this order to erect in the public right-of-way a notice that the use of the area specified herein as a buffer zone is subject to court order, they are authorized to do so. Such signs may contain the following language or words of similar import:

"WARNING. Demonstration and picketing in this area are limited by court order. Violators of this court order are subject to arrest. See Modified Amended permanent Injunction dated November 27, 1996, filed in Case No. 91-2811-CA-16-L, Circuit Court 18th Judicial Circuit, Seminole County, Florida. Copies of the Modified Amended Permanent Injunction are posted at Brevard County Branch Courthouse, 50 S. Neiman Avenue, Melbourne, Florida; Sarno Complex, 1515 Sarno Road, Melbourne, Florida; and Melbourne City Hall, 900 E. Strawbridge Avenue, Melbourne, Florida.

ORDERED AND ADJUDGED that, in order to provide for the protection of the owners, staff and patients of the Clinic and to prevent the further disruption of the operation of the Clinic, the court hereby enters the following additional orders:

a. Law enforcement officers and Southern Bell Telephone Company are authorized, upon request of the Clinic owners to place a trap on the telephone lines of the Aware Woman Center in order to identify those persons engaged in a phone blockade and jamming of the Clinic's phone lines;

b. Law enforcement authorities, pursuant to the protective provisions of the court's order, are authorized to arrest those persons who appear to be in willful and intentional disobedience of this injunction. Upon such arrest the person so arrested shall be admitted to bail upon the posting of a $500 cash or surety bond, which bond will be returnable as in other criminal cases before a Judge of the County Court for Brevard County sitting as the initial appearance judge fulfilling the responsibilities set forth in Rule 3.130, Florida Rules of Criminal Procedure. In the event of arrest and no bond being posted, the person arrested shall be confined in the Brevard County detention Center and shall be

seen by the Brevard County initial appearance judge within twenty-four hours of arrest. The initial appearance judge shall set a date for arraignment before a Brevard County Judge in the usual manner pertaining to criminal cases.

ORDERED AND ADJUDGED that at all times on all days, respondents shall have the right to congregate, demonstrate and freely express themselves outside the Clinic buffer zone subject to the noise limitations on the days of surgical procedures set out in paragraph 4 of this order and subject also to all other provisions of this order and any other restraining orders and injunctions that may have been issued by other courts.

ORDERED AND ADJUDGED that at all times on all days, respondents will have the right of contact with persons protected hereby so long as it is outside of the Clinic buffer zone. However such contact by a person protected hereby as it relates to a contact at such person's residence or the curtilage thereof is limited to conduct transmitted by the resident to a respondent at a distance from and a time prior to the contact and shall not include the uninvited ringing of a doorbell or knock on a door. Any such contact may be cancelled by such person by words spoken that indicate a desire to end the contact, such as "stop," "withdraw," "back off," "get away," "leave me alone" or words or actions of similar import. Where such desire to end the contact is made known to a respondent, he/she must immediately terminate the contact and leave the residence of the person protected hereby.

ORDERED AND ADJUDGED that the permanent injunction of this court issued September 30, 1992, shall remain in full force and effect as to all persons and entities and places mentioned therein except as hereby modified.

Attached hereto and made a part hereof is a drawing which shows the Clinic buffer zone referred to in this order.

DONE AND ORDERED in Sanford, Seminole County, Florida this 27th day of November, 1996.

NEWMAN D. BROCK
CIRCUIT JUDGE

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_____
Judicial Assistant/Clerk

_____
Date:

APPENDIX D

IN THE CIRCUIT COURT
OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

CASE NO.: 91-2811-CA-16-K

WOMEN'S HEALTH CENTER, INC.,
AWARE WOMAN CENTER FOR
CHOICE, INC., ET AL.,
Petitioners,

vs.

OPERATION RESCUE, OPERATION
RESCUE AMERICA, OPERATION
GOLIATH, ED MARTIN, BRUCE CADLE,
SHIRLEY HOBBS, JUDY MADSEN, ET AL.,
Respondents.

April 8, 1993

AMENDED PERMANENT INJUNCTION

THIS CAUSE came before the court for hearing on the motion of petitioners for sanctions and modification of the permanent injunction entered by this court, (The Honorable Wallace H. Hall), dated September 30, 1992, and the court having taken three days of testimony and having carefully considered the evidence and the legal arguments makes the

following findings:

A. That despite the injunction of September 30, 1992, there has been interference with ingress to the petitioners' facility known as the Aware Woman Clinic located on the northwest corner of U.S. Highway One and Dixie Way in the City of Melbourne, Brevard County, Florida. The interference to ingress has taken the form of persons on the paved portions of Dixie Way, some standing without any obvious relationship to others; some moving about, again without any obvious relationship to others; some holding signs, some not; some approaching, apparently trying to communicate with the occupants of motor vehicles moving on the paved surface; some marching in a circular picket line that traversed the entrance driveways to the two parking lots of the petitioners and the short section of sidewalk joining the two parking lots and then entering the paved portion of the north lane of Dixie Way and returning in the opposite direction. (See drawing attached.) Other persons would be standing, kneeling and sitting on the unpaved shoulders of the public right-of-way. As vehicular traffic approached the area it would, in response to the congestion, slow down. If the destination of such traffic was either of the two parking lots of the petitioners, such traffic slowed even more, sometimes having to momentarily hesitate or stop until persons in the driveway moved out of the way.

B. The number of people on any one day would vary from a handful to a crowd of four hundred. The composition of the crowd would include some of the named respondents in this cause; some persons who were loosely associated with the respondents' organizations, Operation Rescue and Operation Goliath; some who were present in support of the clinic (pro-choice); some law enforcement officers engaging in crowd and traffic control (from five officers on light days to as many as

fifty officers on other days); and some representatives of the print and television media. The frequency with which persons would appear at this location would range from once a week to three times a week with the largest gatherings usually on Saturdays.

C. Associated with such gatherings would be noise emanating from singing, chanting, whistling, loudspeakers on the exterior of the clinic broadcasting music, individual portable radios (boom boxes), and occasional bullhorns. Individuals of the partisan groups would shout and yell at each other, frequently approaching so closely as to be in each other's face trying to out-sound the other, occasionally using boom boxes at full volume as an assist.

D. The Melbourne Police Department officers on the scene on some occasions erected temporary barricades (saw horse type) in an effort to put some distance between the partisan groups. The respondents and those aligned with them, remained primarily in the public right of way (paved and unpaved). The pro choice people would be on the edge of the clinic's lawn and parking lot (private property) but occasionally attempting to share the sidewalk with the opposition. On at least one occasion in order to give more room for people, the police barricaded the north lane of Dixie Way so that two-way vehicular traffic was confined to the single south lane.

E. As traffic slowed on Dixie Way and began its turn into the clinic's driveway, the vehicle would be approached by persons designated by the respondents as sidewalk counselors attempting to get the attention of the vehicles' occupants to give them anti-abortion literature and to urge them not to use the clinic's services. Such so-called sidewalk counselors were assisted in accomplishing their approach to the vehicle by the

hesitation or momentary stopping caused by the time needed for the picket line to open up before the vehicle could enter the parking lot.

F. The clinic has fences on its west and north side, and persons would occasionally place a ladder on the outside of the fence and position themselves at an elevation above the fence and attempt to communicate by shouting at persons (staff and patients) entering the clinic. On one occasion the communication to a clinic staff person took the form of an attempt to invoke the wrath of God by shouting, "I pray that God strikes you dead now!"

G. On other occasions since the entry of the injunction on September 30, 1992, the respondent, Cadle, and others in concert with him approached the private residences or temporary lodging places of clinic employees. These approaches included not only direct communication with the occupants (sometimes the "home alone", minor children of the occupants), but also carrying signs, walking up and down on the sidewalk or street in front of the residence, shouting at passers-by, contacting (ringing doorbells of) neighbors, and providing literature identifying the clinic employee as a "baby killer."

H. On one occasion the respondent, Cadle, with others went to the vicinity of the motel where a staff physician was temporarily staying and demonstrated. While respondent, Cadle, remained outside just off the premises of the motel, others went upon the premises of the motel, some entering the motel lobby, yelling "child murderer" and "baby killer." The doctor testified that as a result of such activity his departure for the clinic was delayed by one-half hour.

I. The same staff physician testified that on one occasion

while he was attempting to enter the parking lot of the clinic, he had to stop his vehicle and remained stopped while respondent, Cadle, and others took their time to get out of the way and while doing so were yelling and screaming at the doctor, "Baby killer" -"We don't want you here in Melbourne." This physician also testified that he witnessed the demonstrators running along side of and in front of patients' vehicles, pushing pamphlets in car windows to persons who had not indicated any interest in such literature. As a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures. The doctor also testified that the noise of singing, chanting, shouting and yelling could be heard through the walls of the clinic and caused stress in the patients during surgical procedures and while recuperating in the recovery rooms. The doctor also testified that he observed some patients turn away from the crowd in the driveway to return at a later date. He testified that such delay in undergoing the procedures also increased the risk associated therewith.

J. On another occasion the doctor was followed as he left the clinic by a person associated with the respondents who communicated his anger to the doctor by pretending to shoot him from the adjoining vehicle. As a result of the foregoing demonstrations and activities, and after a physician similarly employed was killed by an antiabortionist at a clinic in North Florida, this doctor terminated his employment with the clinic.

K. Further the testimony of witnesses shows:

1. That license tag numbers of the clinics patients are recorded by the respondents or persons in concert with them

and then are traced through state records to obtain the home address of such persons who are subsequently contacted by the respondents.

2. That on occasion repeated, nearly simultaneous, multiple telephone calls are made to the clinic, jamming its telephone lines. The jamming of the clinic's telephone system, makes it impossible for clinic staff to summon an ambulance to transfer any patient to the hospital should an emergency arise.

3. That patients and staff are sometimes followed in a stalking manner when they leave the clinic, giving such persons a feeling of great apprehension.

Conclusions

A. That the actions of the respondents and those in concert with them in the street and driveway approaches to the clinic of the plaintiffs continue to impede and obstruct both staff and patients from entering the clinic. The paved surfaces of the public right-of-way must be kept open for the free flow of vehicular traffic.

B. That the noise associated with the demonstrations impermissibly interferes with the operation of the clinic and the well-being of its patients and should be limited and restrained.

C. That the actions of the respondents and those acting in concert with them directed at the residences (including the temporary motel residence) of the clinic staff is impermissible conduct and should be limited and restrained. A person's home is his last place of refuge and his right of privacy therein should be protected. A place of business, not involved

in the controversy of others, should not be subjected to demonstrations that interfere with business customers.

D. That the actions of the respondents and those acting in concert with them in respect to interfering with the telephone service of the clinic is impermissible and should be restrained.

E. That the uninvited contacts, shadowing and stalking by the respondents and those acting in concert with them of the clinic staff and patients are impermissible conduct and should be restrained.

F. That the rights of the respondents to demonstrate, speak and make known their views should be recognized and protected.

It is, therefore

ORDERED AND ADJUDGED that the respondents, Operation Rescue, Operation Rescue America, Operation Goliath, their officers, agents, members, employees and servants, and Ed Martin, Bruce Cadle, Pat Mahoney, Randall Terry, Judy Madsen, and Shirley Hobbs, and all persons acting in concert or participation with them, or on their behalf, with notice in any manner or by means of this order (hereinafter referred to generally as respondents) are permanently enjoined from engaging in the following:

(1) At all times on all days, from entering the premises and property of the Aware Woman Center for Choice, Inc. Clinic (hereinafter Clinic) located at the northwest corner of U.S. Highway One and Dixie Way in Melbourne, Brevard County, Florida.

(2) At all times on all days, from blocking, impeding,

inhibiting, or in any other manner obstructing or interfering with access to, ingress into and egress from any building or parking lot of the Clinic.

(3) At all times on all days, from congregating, picketing, patrolling, demonstrating or entering that portion of public right-of-way or private property within thirty-six (36) feet of the property line of the Clinic. The 36 foot buffer on the south side of the Clinic is demarcated by the south edge of paved surface of Dixie Way. It is the intent of the court that the respondents may use, subject to other restrictions contained herein, the unpaved portion (the shoulder) on the south side of Dixie Way. A drawing is attached hereto showing the various areas and lines. An exception to the 36 foot buffer zone is the area immediately adjacent to the Clinic on the east, lying in the right-of-way of U.S. Highway One. This area is composed of a flat shoulder area rising up an embankment to the easterly property line of the Clinic. The respondents may enter the shoulder area of U.S. Highway One, but may not go up the embankment and must remain at least five (5) feet from the Clinic's east line. Another exception to the 36 foot buffer zone relates to the record title owners of the property to the north and west of the Clinic. The prohibition against entry into the 36 foot buffer zone does not apply to such persons and their invitees. The other prohibitions contained herein do apply, if such owners and their invitees are acting in concert with the respondents. Another exception to the 36 foot buffer zone relates to the area of the pedestrian crosswalk near the area where Dixie Way enters into U.S. Highway One. The testimony before the Court revealed that such crosswalk is not presently marked by customary white lines. It is the request of this court, in order to assist the parties in complying with this injunction, that the City of Melbourne establish a crosswalk area at the eastern end of Dixie Way in customary manner by applying

painted lines on the surface of the pavement. Until such lines are applied, the respondents may use an area of the paved surface of Dixie Way as a crosswalk, but must confine their use of such area to a strip of pavement eight (8) feet wide, running directly from the south edge of Dixie Way to the north edge thereof, the westerly line of such strip being coextensive with the western right-of-way line of U.S. Highway One. (See drawing attached.) After painted lines are applied, the respondents must not enter any portion of the paved surface of Dixie Way outside of the crosswalk within the 36 foot buffer zone. The respondents use of the crosswalk must be limited to the prompt crossing of the street. The crosswalk may not be used as an area of picketing, congregating or demonstrating. The respondents use of the crosswalk must not inhibit or impede the free flow of traffic on Dixie Way, and no stopping or hesitation in the crosswalk shall be allowed.

(4) During the hours of 7:30.a.m. through noon, on Mondays through Saturdays, during surgical procedures and recovery periods, from singing, chanting, whistling, shouting, yelling, use of bullhorns, auto horns, sound amplification equipment or other sounds or images observable to or within earshot of the patients inside the Clinic.

(5) At all times on all days, in an area within three-hundred (300) feet of the Clinic, from physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by inquiring of the respondents. In the event of such invitation, the respondents may engage in communications consisting of conversation of a non-threatening nature and by the delivery of literature within the three-hundred (300) foot area but in no event within the 36 foot buffer zone. Should any individual decline such communication, otherwise known

as "sidewalk counseling", that person shall have the absolute right to leave or walk away and the respondents shall not accompany such person, encircle, surround, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them.

(6) At all times on all days, from approaching, congregating, picketing, patrolling, demonstrating or using bullhorns or other sound amplification equipment within three-hundred (300) feet of the residence of any of the petitioners' employees, staff, owners or agents, or blocking or attempting to block, barricade, or in any other manner, temporarily or otherwise, obstruct the entrances, exits or driveways of the residences of any of the petitioners' employees, staff, owners or agents. The respondents and those acting in concert with them are prohibited from inhibiting or impeding or attempting to impede, temporarily or otherwise, the free ingress or egress of persons to any street that provides the sole access to the street on which those residences are located.

(7) At all times on all days, from physically abusing, grabbing, intimidating, harassing, touching, pushing, shoving, crowding or assaulting persons entering or leaving, working at or using services at the petitioners' Clinic or trying to gain access to, or leave, any of the homes of owners, staff or patients of the Clinic (unless permitted by "invited contact" as defined on page 10 of this order).

(8) At all times on all days, from harassing, intimidating or physically abusing, assaulting or threatening any present or former doctor, health care professional, or other staff member, employee or volunteer who assists in providing services at the petitioners' Clinic.

(9) At all times on all days, from encouraging, inciting,

or securing other persons to commit any of the prohibited acts listed herein.

ORDERED AND ADJUDGED that nothing herein shall restrict duly constituted law enforcement authorities from providing traffic control and regulation and measures necessary to insure public safety and the protection of both public and private property.

ORDERED AND ADJUDGED that any City of Melbourne police officer or other person authorized to serve process may serve a copy of this order on any individual who may not have otherwise received notice of the order. Such officer may read the operative prohibitory language of this order to any individual who is without notice of this order, and such service or oral notice shall subject the person so served or noticed to the sanctions provided for herein for failure to comply herewith. If the authorities of the City of Melbourne determine that it would assist them in enforcing this order to erect in the public right-of-way a notice that the use of the area specified herein as a buffer zone is subject to court order, they are authorized to do so. Such signs may contain the following language or words of similar import: "WARNING. Demonstrations and picketing in this area are limited by court order. Violators of this court order are subject to arrest. See Amended Permanent Injunction dated April 8, 1993, filed in Case No. 91-2811-CA-16-K, Circuit Court, 18th Judicial Circuit, Seminole County, FL. Copies of the Amended Permanent Injunction are posted at Brevard County Branch Courthouse, 50 S. Neiman Ave., Melbourne, FL; Sarno Complex, 1515 Sarno Road, Melbourne, FL; and Melbourne City Hall, 900 E. Strawbridge Ave., Melbourne, FL."

ORDERED AND ADJUDGED that, in order to provide

for the protection of the owners, staff and patients of the Clinic and to prevent the further disruption of the operation of the Clinic, the court hereby enters the following additional orders:

a. Law enforcement officers and Southern Bell Telephone Company are authorized, upon request of the Clinic owners to place a trap on the telephone lines of the Aware Woman Center in order to identify those persons engaged in a phone blockade and jamming of the Clinic's phone lines.

b. Law enforcement authorities, pursuant to the protective provisions of the court's order, are authorized to arrest those persons who appear to be in willful and intentional disobedience of this injunction. Upon such arrest the person so arrested shall be admitted to bail upon the posting of a $500 cash or surety bond, which bond will be returnable before the undersigned judge at his chambers, Room N327, Seminole County Courthouse, 301 N. Park Avenue, Sanford, FL at 8:30 a.m. on the seventh (7th) day after arrest exclusive of weekends and holidays. Any county or circuit judge in Brevard County is authorized to modify, upward or downward, the dollar amount and the return date of such bond upon good cause being shown. In the event of arrest and no bond being posted, the person arrested shall be promptly transferred to the Seminole County jail and the undersigned judge shall be immediately notified by the arresting officer and Seminole County jailer of such confinement. Such arrested persons shall be brought before the undersigned judge not later than 8:30 a.m. of the day following his confinement in the Seminole County jail.

ORDERED AND ADJUDGED that at all times on all days, respondents shall have the right to congregate, demonstrate and freely express themselves outside the Clinic

buffer zone subject to the noise limitations on the days of surgical procedures set out in paragraph 4 of this order and subject also to all other provisions of this order and any other restraining orders and injunctions that may have been issued by other courts.

ORDERED AND ADJUDGED that at all times on all days, respondents will have the right of invited contact with persons protected hereby so long as it is outside of the Clinic buffer zone. "Invited contact" is defined as conduct by the person sought to be contacted which affirmatively indicates a desire to engage in conversation or to receive literature. Such affirmative indication may include where the person sought to be contacted physically approaches the respondent, or where such person extends his or her hand to receive literature, or speaks words indicating a positive interest in what the respondent is saying. Such invited contact by a person protected hereby as it relates to a contact at such persons residence is limited to conduct transmitted by the resident to a respondent at a distance from and at a time prior to the contact and shall not include the uninvited ringing of a doorbell or knock on a door. Any invited contact may be canceled by such person by words spoken that indicate a desire to end the contact, such as "stop", "withdraw", "back off", "get away", "leave me alone" or words or actions of similar import. Where such desire to end the contact is made known to a respondent, he/she must immediately terminate the contact and leave the presence of the person protected hereby.

ORDERED AND ADJUDGED that the permanent injunction of this court issued September 30, 1992, shall remain in full force and effect as to all persons and entities and places mentioned therein except as hereby modified.

Attached hereto and made a part hereof is a drawing

which shows the Clinic buffer zone referred to in this order.

DONE AND ORDERED in Sanford, Seminole County, Florida this 8th day of April, 1993.

/s/ Robert B. McGregor
ROBERT B. MCGREGOR, Circuit Judge

Copies furnished to:

Talbot D'Alemberte, 215 S. Monroe St., Suite 601, Tallahassee, FL 32301
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by /s/ Doris D. Brady
Judicial Assistant

Date: April 8, 1993

Supreme Court, U.S.
FILED
MAR 27 1997
CLERK

(2)

No. 96-1366

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

IN RE Judy Madsen Johnson, Ed Martin, Shirley Hobbs, and Rescue America

Petitioners,

On Petition for Writ of Mandamus to the Eighteenth Judicial Circuit Court of Florida

BRIEF OF RESPONDENTS WOMEN'S HEALTH CENTER, INC., AWARE WOMAN CENTER FOR CHOICE, INC., EPOC CLINIC, INC., AND CENTRAL WOMEN'S HEALTH ORGANIZATION, INC., IN OPPOSITION TO PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF THE CASE

The injunction being challenged in this case was issued in March, 1993 by the Eighteenth Judicial Circuit Court of Florida. The injunction was issued in response to violations of a previous injunction, which failed to prevent petitioners from impeding access to the Aware Woman Center for Choice, Inc., in Melbourne, Florida (hereinafter "the clinic"). *See Madsen v. Women's Health Center, Inc.*, 114 S.Ct. 2516, 2521 (1994). During three days of evidentiary hearings, the Circuit Court heard extensive evidence regarding the activities of petitioners and those acting in concert with them. These activities included the harassment of the patients and medical personnel of the clinic, the blocking of traffic to and from the clinic, and "the confrontation of minor children of clinic employees who were home alone." *Madsen*, *supra*, 114 S.Ct. at 2521.

After the Florida Supreme Court upheld the injunction, this Court granted petitioners' writ of certiorari, and issued the opinion that is the subject of the present petition. *Madsen*, *supra*, 114 S.Ct. 2516. In *Madsen*, this Court rejected petitioners' claim that the injunction is an impermissible prior restraint of petitioners' speech. *Madsen*, *supra*, 114 S.Ct. at 2524 n.2 This Court also rejected petitioners' claim that the injunction is a content-based regulation of speech. On the contrary, the Court noted, "the state court imposed restrictions on petitioners incidental to their antiabortion message because they repeatedly violated the court's original order." *Madsen*, *supra*, 114 S.Ct. at 2523-24. Thus, this Court treated the injunction as a content-neutral regulation of the time, place, and manner of petitioners' speech.

Because injunctions and general ordinances affect speech in different ways, the Court held that a "somewhat more stringent application of general First Amendment principles" applies to injunctions. In particular, the Court modified the "narrow tailoring" component of the time, place, and manner standard, *see Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), to require a showing that an injunction "burden[s] no more speech than necessary to serve a significant government interest." *Madsen*, *supra*, 114 S.Ct. at 2525.

Applying this standard to the injunction issued by the Florida trial court, this Court endorsed the Florida Supreme Court's findings that the injunction was justified by several significant governmental interests. These interests included "protecting a woman's freedom to seek lawful medical or counseling services in connection with her pregnancy, . . . ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, . . . [and] protecting the property rights of all its citizens." *Madsen*, *supra*, 114 S.Ct. at 2526. The Florida Supreme Court also noted the strong state interest in residential privacy. *Id.* This Court held that "We agree with the Supreme Court of Florida that the combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction to protect them." *Id.*

After holding that the evidence provided a justification for regulating petitioners' conduct, the Court then turned to consider the specific provisions of the injunction. This consideration was necessarily limited because petitioners had not included a full factual record as an appendix in the Florida Supreme Court, and had never certified a full record. *Madsen*, *supra*, 114 S.Ct. at 2527-

28. In their *Madsen* appeal, petitioners chose to rely on a facial challenge to the injunction and "studiously refrained from challenging the factual basis for the injunction both in the state courts and here." *Madsen*, *supra*, 114 S.Ct. at 2527.

Based on the incomplete record before it, this Court upheld some provisions of the injunction against petitioners' facial challenge and rejected other provisions as burdening more speech than necessary based on "the record before us." *Madsen*, *supra*, 114 S.Ct. at 2528; *id.* at 2530. The modifications to the injunction that are the basis of the present petition are the product of a much more detailed record than this Court has yet seen. The trial court has applied this Court's instructions to the full facts in the original record, and produced a narrower, more carefully focused injunction.

The particular provisions challenged by petitioners will be addressed briefly below. *See infra* pp. 13-20. However, it is inappropriate to undertake the necessarily fact-bound and subtle review of these provisions in the context of a petition for a writ of mandamus. A writ of mandamus is not justified in this case.

The Modified Amended Permanent Injunction challenged by petitioners was entered on November 27, 1997. Petition for Writ of Mandamus ("Petition"), Appendix C. On December 24, 1996, petitioners filed a Notice of Appeal with the Florida Circuit Court. (Copies of petitioners' Notice of Appeal have been lodged with the Supreme Court Clerk's Office.) On March 6, 1997, petitioners filed a motion to request a record on appeal. (Copies of this motion have also been lodged with Supreme Court Clerk's Office.) In their state court appeal, petitioners may raise each of the claims they now at-

tempt to bring before this Court through the extraordinary channel of a petition for a writ of mandamus. If petitioners' claims have merit, the District Court of Appeals has full authority to compel presentation of a full record and grant any relief that may be warranted, including further modification of the injunction. Therefore, this petition for writ of mandamus should be denied, and this Court should permit the state courts to consider petitioners' appeal in a more orderly fashion.

I.

A PETITION FOR A WRIT OF MANDAMUS IS INAPPROPRIATE IN THIS CASE BECAUSE AN APPEAL IS PENDING IN STATE COURT, THE CASE IS HIGHLY FACT-SPECIFIC, THIS COURT HAS NEVER SEEN THE FULL RECORD, AND THERE ARE NO SPECIAL CIRCUMSTANCES DICTATING EXTRAORDINARY REVIEW

The writ of mandamus is an extraordinary writ. According to a long line of case law, extraordinary writs "are drastic and extraordinary remedies," which are reserved for cases in which "appeal is a clearly inadequate remedy." *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947). Such writs are "sparingly exercised." *Parr v. United States*, 351 U.S. 513, 520 (1956). "The preemptory common-law writs are among the most potent weapons in the judicial arsenal. 'As extraordinary remedies, they are reserved for really extraordinary causes.'" *Will v. United States*, 389 U.S. 90, 107 (1967)(quoting *Ex Parte Fahey*, *supra*, 332 U.S. at 260).

This theme is emphasized throughout Supreme Court Rule 20, which discusses the considerations governing the issuance of extraordinary writs by this Court. According to Rule 20, the issuance of an extraordinary writ such as a writ of mandamus "is not a matter of right, but of discretion sparingly exercised." Sup. Ct. R. 20(1). Thus, a petition for a writ of mandamus "must show . . . that exceptional circumstances warrant the exercise of the Court's discretionary powers, and that adequate relief cannot be obtained in any other form or from any other court." *Id.*

There are few "exceptional circumstances" justifying the "drastic" remedy of a writ of mandamus. "In accord with . . . historic practice, we have held that only 'exceptional circumstances amounting to a judicial "usurpation of power"' will justify issuance of the writ." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988)(quoting *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) and *United States v. Duell*, 172 U.S. 576, 582 (1899)). Petitioners have "the burden of showing that [their] right to issuance of the writ is 'clear and indisputable'." *Bankers Life*, *supra*, 346 U.S. at 384 (quoting *United States v. Duell*, *supra*, 172 U.S. at 582).

Petitioners have fallen far short of meeting their burden in this case. Petitioners have cited nothing even resembling a "judicial usurpation of power" by the Florida Circuit Court. Indeed, two factors make this an especially inappropriate case for the issuance of writ of mandamus. First, this case involves the application of a standard that requires the trial judge to exercise a significant amount of discretion. Second, petitioners have already filed an appeal to the state appellate court, which can provide them

with the full relief they request from this Court. Therefore, this is not a case in which "appeal is a clearly inadequate remedy." *Ex parte Fahey*, *supra*, 332 U.S. at 260.

With regard to the first factor, this Court has held that "[w]here a matter is committed to the discretion of a [trial court], it cannot be said that a litigant's right to a particular result is 'clear and indisputable,'" *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665-66 (1978). *See also Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 36 (1980). Therefore, a writ of mandamus is inappropriate in cases involving the exercise of a significant amount of discretion by the trial court.

In *Madsen*, this Court noted that one of the advantages of an injunction is that it "can be tailored by a trial judge to afford more precise relief than a statute where a violation of the law has already occurred." *Madsen*, *supra*, 114 S.Ct. at 2524. This tailoring process necessarily involves the exercise of a significant amount of discretion by a trial judge, who holds evidentiary hearings and thus becomes intimately familiar with the facts of a particular case. In *Madsen*, the Court recognized the need for substantial trial court discretion in cases such as this, and noted that "some deference must be given to the state court's familiarity with the facts and the background of the dispute between the parties even under our heightened review." *Madsen*, *supra*, 114 S.Ct. at 2527 (citing *Milk Wagon Drivers v. Meadowmoor Diaries, Inc.*, 312 U.S. 287, 294 (1941)). The Court reaffirmed this principle this Term in *Schenck v. Pro-Choice Network of Western New York*, No. 95-1065, 1997 WL 65718 (U.S. Feb. 19, 1997): "Although one might quibble about whether 15 feet is too great or too small a distance if the

goal is to ensure access [to the clinic], we defer to the District Court's reasonable assessment of the number of feet necessary to keep the entrances clear." *Id.* at *12.

The broad grant of discretion to the trial court in cases such as this renders the present petition for a writ of mandamus inappropriate. Of course, the trial court's discretion is not unlimited. But the proper channels of reviewing the trial court's exercise of discretion must be followed to ensure that the factual circumstances taken into account by the trial court receive proper consideration by higher courts. Thus, petitioners' proper course is to file an appeal from the trial court's order (as petitioners in this case have already done), and proceed through the normal course of litigation.

The availability of full relief through appeal is the second factor rendering a writ of mandamus inappropriate in this case. One of the clearest principles of mandamus litigation is that writs of mandamus and other extraordinary writs "cannot be used as a substitute for appeals." *Bankers Life*, *supra*, 346 U.S. at 383; *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 27-28 (1943)("Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record."). Thus, mandamus "should be resorted to only where appeal is a clearly inadequate remedy." *Ex parte Fahey*, *supra*, 332 U.S. at 260.

Petitioners' claims here amount to nothing more than a series of contentions that the trial court applied the new *Madsen* standard incorrectly. These claims are insufficient to circumvent the rule prohibiting parties from using mandamus as a substitute for ordinary appeals. "The writ of mandamus is not to be used when 'the most

that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction.'" *Schlagenhauf v. Holder*, 379 U.S. 104, 112 (1964)(quoting *Parr v. United States*, 351 U.S. 513, 520 (1956). The prohibition on using writs of mandamus as a substitute for appeal to challenge allegedly erroneous lower court judgments applies "even though hardship may result from delay and perhaps unnecessary trial." *Schlagenhauf, supra*, 379 U.S. at 110; *Bankers Life, supra*, 346 U.S. at 383. Petitioners have cited no additional hardships imposed on them in this case beyond the slight delay that is inevitable in every appeal. This falls far short of what is required for the unusual relief they request.

Petitioners have failed to cite even one reason why this case is different than an ordinary appeal. There is not the slightest indication of a "judicial usurpation of power" by the trial court or any other exceptional circumstance required by this Court's rules for granting an extraordinary writ. Petitioners have therefore failed to satisfy either the requirements of Supreme Court Rule 20 or the principles set forth in this Court's many precedents regarding the limited availability of extraordinary writs. Thus, a writ of mandamus is inappropriate in this case, and the present petition should be denied.

II.

THE TRIAL COURT'S MODIFIED AMENDED PERMANENT INJUNCTION COMPLIES WITH THIS COURT'S MANDATE

Petitioners claim that the trial court failed to comply with this Court's mandate in *Madsen*. There are two

aspects to this claim: first, that the trial court erred in failing to take new evidence at the hearing held after the remand, *see* Petition at 23-25, and second, that the specific provisions of the modified injunction are inconsistent with the law set forth in *Madsen*, *see* Petition at 7-23. As noted above, petitioners' simple claim that the trial court's order is erroneous is insufficient to support this petition for a writ of mandamus. But even if this Court were to reach the merits of petitioners' claim, it would be forced to reject their challenge to the modified injunction entered by the trial court.

Petitioners' claim is based on two inaccurate premises. The first inaccurate premise is petitioners' assertion that the trial court expanded the scope of the injunction after the remand from this Court's *Madsen* decision. *See* Petition at 4 (claiming that trial court "included additional restrictions" in modified injunction); *id.* at 8 (trial court "offered new, substantive restrictions" in modified injunction); *id.* at 17 (trial court "added further restrictions" to residential picketing portion of injunction); *id.* at 23 (trial court "exceeded this Court's Mandate by adding even further unconstitutional restrictions to free speech"). It would be difficult to discern from petitioners' characterization of the modified injunction that each aspect of the injunction to which petitioners object is significantly narrower in scope than the analogous provisions in the version of the injunction reviewed by this Court in *Madsen*. The trial court did not "add further unconstitutional restrictions" to the injunction; rather, the trial court narrowed previous provisions that had been found by this Court to "sweep more broadly than necessary to accomplish the permissible goals of the injunction." *Madsen*, *supra*, 114 S.Ct. at 2530.

The fact that petitioners mistakenly construe the modified injunction as violating this Court's mandate in *Madsen* by "adding restrictions" to speech highlights the second inaccurate premise of petitioners' claim. It is clear from the nature of their arguments that petitioners are operating under a serious misunderstanding about this Court's holding in *Madsen*. Petitioners seem to believe that this Court held in *Madsen* that the facts of this case could never justify an injunction provision narrowly regulating threats conveyed to clinic patients and employees, targeted picketing of residences of clinic staff, or harassment, threats, and physical abuse of patients and staff going to or from the clinic, even if this behavior occurred outside the 36-foot buffer specifically upheld in *Madsen*. Nothing in this Court's *Madsen* opinion comes close to this extreme position.

In *Madsen*, this Court did nothing more than hold that some provisions in the earlier version of the injunction were too broad in light of the limited record before the Court in that appeal. It must be reemphasized that in the *Madsen* appeal petitioners "studiously refrained from challenging the factual basis for the injunction both in the state courts and here," *Madsen*, *supra*, 114 S.Ct. at 2527, and therefore this Court's conclusions about the legitimate breadth of the injunction was necessarily limited by the Court's reference to "the record before us." *Madsen*, *supra*, 114 S.Ct. at 2528; *id.* at 2530.

In light of the fact that this Court's opinion was specifically addressed to a facial challenge to the earlier version of the injunction, rather than a challenge to the factual sufficiency of the record below to support the injunction, this Court's subsequent mandate remanding the case to the Florida courts "for further proceedings not in-

consistent with the opinion of this Court," *see* Petition, Appendix B, at B-1, offered the trial court two options. The trial court's first option was to support the existing provisions with specific references to evidence introduced in its three-day evidentiary hearing but not included in the record of the original appeal to this Court. The trial court's second option was to narrow the injunction provisions as much as possible, consistent with the continuing need to protect the interests of clinic patients and staff--which this Court specifically endorsed in *Madsen*. *See Madsen*, *supra*, 114 S.Ct. at 2526 ("We agree with the Supreme Court of Florida that the combination of these governmental interests is quite sufficient to justify an appropriately tailored injunction to protect them.") The trial court chose the latter course, and therefore carefully constructed the modified injunction provisions in issue here around the comments this Court made about the proper scope of an injunction, in light of the extensive evidence already accumulated in this case.

In addition to petitioners' challenge to specific provisions of the modified injunction (which will be addressed seriatim below), they also contend that this Court's mandate in *Madsen* obligated the trial court to take additional evidence before narrowing the injunction to comply with the principles stated in the *Madsen* decision. Petitioners specifically object that the modified injunction is invalid because "the trial court had no new evidence stating that the Petitioners have violated, or imminently will violate, some provision of statutory or common law." Petition at 25. Petitioners' assertion that the trial court must take new evidence before conforming the injunction to this Court's ruling has no basis in the *Madsen* opinion, and indeed is contrary to the clear implica-

tion of this Court's recognition in *Madsen* that it was dealing with a facial challenge to the injunction rather than a challenge to the sufficiency of the factual record to support the injunction. *See Madsen*, *supra*, 114 S.Ct. at 2527.

Contrary to petitioners' assertion, this Court's *Madsen* opinion did not magically erase the extensive evidence that the trial court has already assembled of the serious problems caused by the activities of petitioners and those acting in concert with them. Indeed, this Court held in *Madsen* that "[w]e must . . . judge this case on the assumption that the evidence and testimony presented to the state court supported its findings that the presence of protesters standing, marching, and demonstrating near the clinic's entrance interfered with ingress and egress from the clinic despite the issuance of the earlier injunction." *Madsen*, *supra*, 114 S.Ct. at 2528. The Court also took note of petitioners' violations of a previous injunction, *Madsen*, *supra*, 114 S.Ct. at 2520, and petitioners' continued harassment of clinic staff at home and on the way to and from the clinic. *Id.* The extensive evidence introduced during three days of testimony in the trial court amply supports the new, narrower provisions of the modified injunction. The trial court has no obligation to revisit facts that have already been proved true. If petitioners disagree, their remedy is not to obtain a writ of mandamus from this Court, but rather to pursue the appeal they have already filed (accompanied by a full record) to the Florida District Court of Appeal.

In addition to these basic misconceptions about the general meaning of this Court's *Madsen* decision, petitioners have also misconstrued the guidelines this Court provided regarding the legitimate scope of specific

provisions of the version of the injunction reviewed in *Madsen*. The broad outlines of petitioners' misconceptions with regard to each provision are set forth below.

A.

The 36-Foot Buffer Zone Around the Clinic

In the version of the injunction reviewed by this Court in *Madsen*, a central provision prohibited petitioners from "congregating, picketing, patrolling, demonstrating or entering" any portion of the public right-of-way or private property within 36 feet of the property line of the clinic. *Madsen*, *supra*, 114 S.Ct. at 2526. This Court's ruling on the 36-foot buffer zone was based on the particular configuration of the clinic. The southern edge of the clinic's property abuts a two-lane residential street named "Dixie Way"; the north and west edges of the clinic property are adjacent to private property; the east edge of the clinic property abuts the right-of-way of U.S. Highway One, a major four-lane highway. *See* Modified Amended Permanent Injunction, Petition Appendix C, at C-8 - C-9.

In *Madsen*, this Court upheld the portion of the 36-foot buffer zone along the southern edge of the clinic. The Court noted that the injunction created a "complete buffer zone" on the southern side of the clinic. *Madsen*, *supra*, 114 S.Ct. at 2527. The Court agreed with the state courts that "allowing the petitioners to remain on the clinic's sidewalk and driveway was not a viable option in view of the failure of the first injunction to protect access." *Id.* The Court held that the buffer zone burdened no more speech than necessary because "the buffer zone

was narrow enough to place petitioners at a distance of no greater than 10 to 12 feet from cars approaching and leaving the clinic." *Id.*

The Court struck down the application of the injunction to the private property on the northern and western edges of the clinic because "[p]atients and staff wishing to reach the clinic do not have to cross the private property abutting the clinic property on the north and west, and nothing in the record indicates that petitioners' activities on the private property have obstructed access to the clinic." *Id.* at 2528. The Court said nothing at all about the provisions of the injunction pertaining to the eastern edge of the clinic along U.S. Highway One.

In response to this Court's opinion, the modified injunction entered by the trial court specifically states that the 36-foot buffer "does not apply" to the property to the west and north of the clinic. Modified Amended Permanent Injunction, Petition Appendix C, at C-8. The other portions of this provision are unchanged from the previous version of the injunction. Petitioners' claim that the trial court has failed to comply with this Court's mandate is apparently a reference to the application of the buffer zone to the east side of the clinic. *See* Petition at 13-14. However, given the fact that this Court did not address that part of the injunction, it is difficult to understand how it could be part of the Court's mandate to the trial court.

Also, petitioners overlook the fact that, as written, the modified injunction contains an explicit exception to the 36-foot buffer zone for protesters along the right-of-way to U.S. Highway One. *Id.* at C-8. Since the provision in question does not bar protesters from the right-of-way of U.S. Highway One on the east side of the clinic,

the injunction does not burden petitioners' speech at all. Therefore, the provision necessarily conforms to the *Madsen* requirement that an injunction burden no more speech than necessary. The specific terms of the injunction permit protesters to address their protests to cars travelling south on Highway One on the way to the clinic. This provision permits precisely the same type of speech that already occurs on the southern side of the clinic adjacent to Dixie Way, which this Court specifically upheld against a First Amendment challenge in *Madsen*. Thus, the petitioners' challenge to the provision of the modified injunction regarding the east side of the clinic has no merit.

B.

The "Images Observable" Provision

In *Madsen*, this Court struck down a provision of the injunction that broadly prohibited "images observable to . . . patients inside the Clinic." *Madsen*, *supra*, 114 S.Ct. at 2522, 2528-29. On remand, the trial court strictly limited the "images observable" portion of the injunction to "images which convey threats, veiled or otherwise." Modified Amended Permanent Injunction, Petition Appendix C, at C-9. Petitioners contend that this Court's *Madsen* decision amounted to an absolute prohibition on any regulation of "images observable" from the clinic. *See* Petition at 15 ("Since the trial court only reworded the 'images observable' provision instead of striking it, the trial court violated this Court's Mandate.").

Petitioners have misinterpreted the *Madsen* decision, and ignore the fact that the trial court took the language of the modified injunction directly from the *Madsen*

majority opinion. This Court itself noted that "threats to patients or their families, however communicated, are proscribable under the First Amendment." *Madsen*, *supra*, 114 S.Ct. at 2529. The Court went on to suggest that instead of imposing a "blanket ban" on images observable, the trial court should have prohibited merely "the display of signs that could be interpreted as threats or veiled threats. . . ." *Id.* The trial court adopted this Court's suggestion verbatim when it drafted the modified injunction. Since the language of the modified injunction came from this Court's own opinion, petitioners cannot plausibly claim that the trial court failed to carry out the *Madsen* mandate.

C.

The Residential Picketing Provision

The trial court also took this Court's advice in narrowing the residential picketing portion of the injunction. In the version of the injunction reviewed by this Court, the residential picketing provision prohibiting picketing, demonstrating, or using sound amplification equipment within 300 feet of the residences of clinic staff. *See Madsen*, *supra*, 114 S.Ct. at 2529. This Court held that a total ban on picketing within 300 feet of residences was too broad. However, the Court also noted that "[t]he State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Madsen*, *supra*, 114 S.Ct. at 2530 (quoting *Frisby v. Schultz*, 487 U.S. 474, 484 (1988). The problem with the original residential picketing provision, the Court held, is that the total 300-foot

ban on picketing was not limited to "focused picketing taking place solely in front of a particular residence," *Madsen*, 114 S.Ct. at 2530, which the Court had previously recognized is subject to regulation under proper circumstances, *see Frisby*, *supra*. Therefore, this Court suggested, "it appears that a limitation on the time, duration of picketing, and number of pickets outside a smaller zone could have accomplished the desired result." *Madsen*, *supra*, 114 S.Ct. 2530.

This is precisely the approach taken on remand by the trial court. Instead of a total ban on picketing within 300 feet of clinic staff residences, the modified injunction substitutes a time limit (weekdays, except national holidays, from 10:00 a.m. to noon), a durational limit (two hours per day), and a limit on the number of pickets (no more than twenty-five picketers at any one time). Modified Amended Permanent Injunction, Petition Appendix C, at C-10. As long as they observe these limits, as well as a ban on threats and a prohibition on blocking access to any residence, picketers may protest directly across the street from the home of any clinic staff member. This provision of the modified injunction is far less intrusive into the speech rights of protesters than the total ban on focused picketing this Court upheld in *Frisby*, 487 U.S. 474, and thus easily satisfies the *Madsen* standard.

Petitioners seem to misunderstand what the modified injunction permits. According to petitioners, "Judge Brock not only kept the [300-foot buffer] zone, he also added new restrictions." Petition at 18. Petitioners thus seem to believe that the speech of protesters is more restricted under the present injunction than it was under the version reviewed by this Court in *Madsen*. On the contrary, the modified injunction permits a far greater

range of protests in close proximity to the residences of clinic staff than the previous provision that it replaces. The "new restrictions" to which petitioners refer are simply the sorts of narrow time, place, and manner provisions suggested by this Court as mechanisms for protecting the tranquility of staff homes while permitted reasonable pickets during a portion of each day.

Petitioners also attack a provision of the modified injunction that prohibits uninvited approaches to the homes of clinic staff. *See* Petition at 18-21. This provision was not addressed by the Court in *Madsen* and therefore is not part of the Court's mandate. In any event, petitioners' attempt to link this provision with the "uninvited contact" provision of the previous version of the injunction, which prohibited "uninvited contact" in public spaces within a 300-foot buffer zone around the clinic, is inconsistent with this Court's precedents holding that the interest in residential privacy justifies regulation of speech that the resident does not want to hear in his or her home. *See Rowan v. U.S. Post Office Dept.*, 397 U.S. 728 (1970). The First Amendment rules regarding uninvited contact on a public sidewalk are fundamentally different than the rules regarding uninvited contact in the sanctity of one's own home. This Court's decisions recognize that the home is an individual's only real refuge from the world, *see, e.g., Madsen, supra*, 114 S.Ct. at 2529, and the rules regarding uninvited contact in the home reflect that understanding.

D.

The Individual Harassment Provision

The final provision of the modified injunction challenged by petitioners deals with contact between protesters and clinic patients and staff in public spaces outside the 36-foot buffer zone surrounding the clinic. The relevant provision in the version of the injunction reviewed by this Court prohibited any uninvited contact in an area within 300 feet of the clinic. *Madsen*, *supra*, 114 S.Ct. at 2529. This Court struck this provision as burdening more speech than necessary, in that it prohibited all uninvited contact "regardless of how peaceful the contact may be. . . ." *Id.* The Court noted that "the 'consent' requirement alone invalidates this provision. . . ." *Id.* at 2529. In the modified injunction, the trial court eliminated the uninvited contact provisions that this Court found unconstitutional, and clearly gave protesters the right to approach persons outside the 36-foot clinic buffer zone. Modified Amended Permanent Injunction, Petition Appendix C, at C-9 - C-13.

Contrary to the implications of petitioners' argument, this Court did not suggest in *Madsen* that no restriction on abusive behavior was permissible outside the 36-foot buffer zone. On the contrary, this Court once again suggested an acceptably narrow alternative to the previously overbroad injunction provisions, and once again the trial court adopted the Court's suggestion.

This Court suggested that a sustainable provision dealing with contact between protesters and clinic patients and staff would be limited to speech "that is independently proscribable (i.e., 'fighting words' or threats), or is so in-

fused with violence as to be indistinguishable from a threat of physical harm. . . ." *Id.* This limited restriction on abusive conduct is the gist of the relevant new provision of the modified injunction. The new provision specifically permits uninvited contact (thus eliminating the objectionable provision from the previous injunction), but notes that persons approached by protesters have the absolute right to walk away, and protesters "shall not encircle, surround, impede the progress or, harass, threaten or physically or verbally abuse those individuals who choose not to communicate with them." Modified Amended Permanent Injunction, Petition Appendix C, at C-9 - C-10. This is the very type of conduct that is "so infused with violence as to be indistinguishable from a threat of physical harm," and thus is permissible under this Court's *Madsen* opinion.

With regard to this and other specific provisions of the modified injunction to which petitioners object, petitioners insist that the trial court's sole function on remand was to delete entire provisions of the injunction. They insist that the judge was obligated to use only an eraser and not a pen. They complain that any attempt to rephrase the injunction to comply with the *Madsen* decision violates this Court's mandate. Respondents agree that the trial court deleted unconstitutional provisions and significantly revised the remainder of the injunction, but strongly disagree that a sincere effort to incorporate this Court's suggestions and recommendations could logically be construed as a violation of this Court's mandate.

CONCLUSION

The petition for a writ of mandamus should be denied.

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Supreme Court, U.S.
FILED
APR 11 1997
OFFICE OF THE CLERK

No. 96-1366

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

In re

JUDY MADSEN JOHNSON, ED MARTIN, SHIRLEY HOBBS and RESCUE AMERICA,

Petitioners.

On Petition for Writ of Mandamus to the Eighteenth Judicial Circuit Court of Florida

REPLY BRIEF OF PETITIONERS TO PETITION FOR WRIT OF MANDAMUS

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REPLY BRIEF OF PETITIONERS TO PETITION FOR WRIT OF MANDAMUS

Judy Madsen Johnson, Ed Martin, Shirley Hobbs and Rescue America respectfully petition for a writ of mandamus to compel the Eighteenth Judicial Circuit Court of Florida to comply with this Court's Mandate in *Madsen v. Women's Health Center, Inc*, 114 S. Ct 2516 (1994).

I.

THE RECORD BEFORE THIS COURT IS THE IDENTICAL RECORD WHICH WAS BEFORE THE TRIAL COURT, AND THEREFORE THE TRIAL COURT EXCEEDED ITS AUTHORITY BY ADDING RESTRICTIONS TO THE INJUNCTION WITHOUT HEARING ANY NEW EVIDENCE TO JUSTIFY THE RESTRICTIONS.

The entire record in this case is contained in the Joint Appendix, a 626 page document which was filed with this Court. **All** of the testimony which was transcribed from the hearings in 1993 is contained in the Joint Appendix.

Nevertheless, Respondents state in their brief that this Court had an incomplete record before it when it rendered its decision in *Madsen*. Brief of Respondents Women's Health Center, Inc., Aware Woman Center for Choice, Inc., EPOC Clinic, Inc., and Central Women's Health Organization, Inc., in opposition to Petition for Writ of Mandamus (hereinafter "Brief") at 2 - 3, 10. Based on this inaccurate premise, Respondents argue that the new, substantive restrictions added to the Modified Amended Permanent Injunction are justified since they "are a product of a much more detailed record than this Court has yet seen." Brief at 3.

There is **no** record evidence in this case which is not contained in the Joint Appendix.[1] There has been no further

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[1] Judge McGregor issued the Amended Permanent Injunction at issue in *Madsen*. He has since retired. Judge Brock was assigned to this case following this Court's remand. No new evidence has been presented in this case. All Judge Brock had to rely on was the evidence in the Joint

evidence introduced in this case since 1993. Accordingly, when the trial court created the new restrictions in 1996, it did so without the benefit of any new evidence. This Court clearly ordered the Florida courts to strike the unconstitutional provisions from the injunction. The trial court failed to follow this Court's clear mandate to strike the unconstitutional provisions but instead chose to invent new, highly specific, substantive restrictions upon Petitioners' Free Speech rights, without any new evidence to support the new restrictions. Respondents' attempt to refute this fact by claiming the trial court had a fuller record than this Court is without foundation.

Respondents argue that "this case involves the application of a standard that requires the trial judge to exercise a significant amount of discretion." Brief at 5. The only issue addressed in the Petition for Writ of Mandamus is that this Court unequivocally struck down provisions in the injunction and mandated the trial court to hold proceedings consistent with that opinion. Petition at 4. To comply with this Court's Mandate requires no discretion at all. Compliance with this Court's Mandate would have been achieved by simply striking the unconstitutional provisions from the injunction.

Respondents state that the tailoring of an injunction entails a trial judge's exercise of discretion after the judge "holds evidentiary hearings and thus becomes intimately familiar with the facts of a particular case." Brief at 6. The essence of this Petition for Writ of Mandamus is that no such evidentiary hearings were held to justify the trial court's "exercise of discretion" to create new, substantive restrictions in the injunction. According to the Respondents' own standard the Modified Amended Permanent Injunction cannot stand. No evidence was presented nor requested. In fact, Petitioners

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Appendix, which is exactly the same evidence before this Court.

have not been anywhere near the Clinic for several years.

Respondents set up a false dichotomy by stating that this Court's Mandate left the trial court with only two options: (1) support the provisions with specific evidence "introduced in its three-day evidentiary hearing but not included in the record" to this Court; or (2) narrow the injunction provisions. Brief at 11. As stated above, Judge Brock had no evidence to review which was not contained in the Joint Appendix before this Court and he took no subsequent evidence before creating the new restrictions in the Modified Injunction. Narrowing the injunction provisions was certainly an option for the trial court, so long as the trial court obtained evidence to support the new, narrower provisions. The scenario offered by the Respondents omits the obvious response to this Court's Mandate: to strike the unconstitutional provisions. If further restrictions were necessary, the trial court could hold hearings on that issue. Instead, the trial court skipped the essential step of obtaining evidence prior to restricting Petitioners' Free Speech rights and simply added the restrictions. The trial court never cites to any evidence to support these new restrictions.

II.

A WRIT OF MANDAMUS IS NECESSARY AND PROPER IN THIS CASE BECAUSE ADEQUATE RELIEF CANNOT BE OBTAINED IN ANY OTHER FORM FROM ANY OTHER COURT.

Mandamus lies to **rectify a deviation by the trial court from the letter and spirit of the reviewing court's mandate**, and the mandamus approach may appropriately be utilized to correct a misconception of scope and effect of the reviewing

court's decision, or to prevent relitigation of issues already decided by the reviewing court. *Yablonski v. United Mine Workers of America*, 454 F.2d 1036, 1038 (D.C. Cir. 1971), cert. denied 406 U.S. 906. The trial court in this case has deviated from both the letter and the spirit of this Court's clear mandate to strike the unconstitutional provisions from the injunction. Mandamus is appropriately utilized to remedy these kinds of deviations, to "confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

Mandamus is also appropriately utilized to prevent relitigation of issues already decided by the reviewing court. The flaws with the 36-foot buffer zone around the clinic, the "images observable" provision, the 300-foot buffer zone around the residences, and the 300-foot no-approach zone around the clinic were fully litigated in the Eighteenth Judicial Circuit Court in and for Seminole County, Florida; the Florida Supreme Court; and this Court. Respondents claim Petitioners should be denied relief through a mandamus and instead simply relitigate these issues again.

This Court is familiar with the issues in this case and could easily bring this matter to a conclusion by issuing a mandamus ordering the trial court to strike the unconstitutional provisions of the injunction and prohibit the creation of new, substantive restrictions unless the court receives additional evidence supporting the new restrictions. For reasons of judicial economy, mandamus is a clean, simple remedy to rectify the trial court's deviation from the letter and spirit of this Court's mandate.

Respondents claim that Petitioners' appeal of the Modified Amended Permanent Injunction should forestall relief from

this Court. Yet this Court is fully within its rights to issue a writ of mandamus to effectuate or prevent frustration of its previous order. *Potomac Elec. Power Co. v. I.C.C.*, 702 F.2d 1026, 1032 (D.C. Cir. 1983); *United States v. New York Telephone Co.*, 434 U.S. 159, 172 (1977). However, mandamus is within this Court's discretionary powers. If this Court were to deny Petitioners' Petition for Writ of Mandamus, Petitioners must be prepared to pursue all avenues of relief to protect their interests.

Respondents mischaracterize Petitioners' argument as a claim that the trial court applied the *Madsen* standard incorrectly, an error which could be corrected via appeal. Petitioners argument is not that the trial court misapplied the *Madsen* standard, but rather that the trial court simply failed to follow this Court's clear Mandate to strike the unconstitutional provisions of the injunctions. It is this frustration by the trial court of this Court's order which prompted the Petition for Writ of Mandamus.

CONCLUSION

In light of the reasons stated above, the Petitioners respectfully request this Court to issue a Writ of Mandamus to the Eighteenth Judicial Circuit Court of Florida.

Respectfully Submitted,

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